A **TAN CHEE HOE & SONS SDN BHD**

v.

CODE FOCUS SDN BHD

B FEDERAL COURT, PUTRAJAYA
RAUS SHARIF PCA
ABDULL HAMID EMBONG FCJ
AHMAD MAAROP FCJ
ABU SAMAH NORDIN FCJ
C RAMLY ALI FCJ
[CIVIL APPEAL NO: 02(f)-32-06-2013(W)
4 MARCH 2014

D ***CONTRACT:*** *Waiver - Conditions precedent - Sale and Purchase agreement - Sale of shares and substantial assets of company - Shareholders' approval for sale - Whether waived by parties - Whether offending s. 132C Companies Act 1965 - Mandatory statutory requirements - Whether could not be waived by contracting parties - Whether waiver void - Whether agreement invalidated - Claims based on*
E *terms of agreement - Whether unsustainable - Contracts Act 1950, s. 24 - Companies Act 1965, s. 132C & 132C(3)*

F ***CONTRACT:*** *Void contract - Formation - Effect - Sale and purchase agreement - Sale of shares and substantial assets of company - Shareholders' approval for sale waived by parties - Whether contravening s. 132 Companies Act 1965 - Whether parties had 'actual notice' of contravention - Whether not entitled to exception to 'void' rule - Whether contract void and not voidable - Benefits paid and received under contract - Whether to be restored - Contracts Act 1950, s. 66 - Companies Act*
G *1965, s. 132C & 132C(3)*

H ***CIVIL PROCEDURE:*** *Damages - Contract, breach of - Sale and purchase agreement - Contract performed in manner prohibited by statute - Whether void and unenforceable - Breach of terms thereof - Whether not amenable to order for damages - Defendant ordered to pay damages to be assessed or in lieu of assessment agreed liquidated damages as per void agreement - Whether devoid of legal basis*

I ***CIVIL PROCEDURE:*** *Interest - Interest payable on refund - Interest payable on refund of money paid under void contract - Calculation - Effective date for calculation of interest - Whether to take effect from date action was commenced at first instance - Whether inappropriate to award interest from date before institution of action*

The defendant (appellant) is the owner of the entire shares in Choo Hoe Sdn Bhd (CHSB) whose only asset is a piece of land in the township of Kuala Lumpur. By an agreement dated 10 November 1995 ('SPA'), the defendant agreed to sell the whole of its shareholding in CHSB to the plaintiff for a consideration of RM16 million. The plaintiff paid a 10% deposit of RM1.6 million and undertook to pay the balance sum by the completion date, 9 February 1996. The facts showed that the SPA made the completion date subject to two conditions, *viz*. the respective approvals of the Foreign Investment Committee and the defendant's shareholders for the intended sale ('conditions precedent'). However, by a document executed by the plaintiff simultaneously with the SPA ('side letter'), the plaintiff waived the defendant's obligations *vis-à-vis* the conditions precedent. The plaintiff executed the side letter notwithstanding that one of the conditions precedent, namely approval of the defendant's shareholders at an EGM, was mandated by s. 132C of the Companies Act 1965 ('Companies Act'). Misunderstandings arose between the parties as to their respective obligations under the SPA, and by the completion date, neither the balance sum nor vacant possession had been exchanged between the plaintiff and the defendant. Subsequently, the defendant terminated the SPA and forfeited the deposit. Arising therefrom, on 22 January 2002, the plaintiff filed an action in the Kuala Lumpur High Court claiming for the refund of the deposit, *albeit* unsuccessfully. It was the view of the High Court Judge, in dismissing the claim, that the waiver in the side letter was valid and enforceable, and that the defendant's non-performance of the conditions precedent did not cause the SPA to be void. According to the learned judge further, delivery of vacant possession was only a warranty and that the defendant's failure to deliver vacant possession on the completion date did not therefore amount to a breach of condition of the SPA. On appeal, the Court of Appeal however reversed the High Court's finding, opining that the mandatory statutory requirements under s. 132C of the Companies Act could not be waived, that the side letter was ineffective and void, that the SPA was not void but only voidable at the plaintiff's option, and that the defendant had breached the SPA. The Court of Appeal, in the event, ordered for the refund of RM1.6 million deposit and for damages to be assessed with interest at 8% p.a. calculated from 10 February 1996 (the completion date) to the date of full settlement, or, *in lieu* of assessment, for the defendant to pay the plaintiff the sum of RM3.2 million as agreed liquidated damages as per cl. 11B of the SPA.

Before the Federal Court, leave to appeal was granted essentially on the following questions of law, namely: (i) whether, in view of s. 66 of the Contracts Act 1950 ('Contracts Act'), the Court of Appeal could make the order for damages to be assessed in favour of the plaintiff or *in lieu* thereof, to enforce cl. 11B of the void SPA; and (ii) whether 'vacant possession' in a property transaction means freedom from physical impediment which substantially interferes with the enjoyment of a substantial part of the property. Evidently too, in its quest to challenge the restitution order of the Court of Appeal, the defendant, *inter alia,* relied on the authorities of the Federal Court and the Privy Council respectively in *Rimba Muda Timber Trading v. Lim Kuoh Wee ('Rimba Muda')* and *Sajan Singh v. Sardara Ali ('Sajan Singh')*.

Held (allowing appeal partly; setting aside order for damages to be assessed together with interest or *in lieu* thereof for payment of RM3.2 million as agreed liquidated damages; affirming order to refund 10% deposit to plaintiff with variation that interest be made payable from 22 January 2002 to date of full settlement)

Per Ramly Ali FCJ delivering the judgment of the court:

(1) The effect of the old and new subs. 3 of s. 132C of the Companies Act on the status of a third party dealing with the company is still the same, *ie*, it loses the benefit of the statutory rule in s. 132C(1) if it had 'actual notice' of the contravention or non-compliance of the requirement. In other words, if a third party such as the plaintiff had 'actual notice' of the non-compliance of s. 132C(1), then it cannot rely on the exception under s. 132C(3) to enforce the transaction or agreement in question. Such transaction or agreement is void and invalid (not voidable) as against the whole world including the third party. (para 24)

(2) The side letter was signed with the plaintiff's approval and authority and was validly executed. The effect of the finding of the learned judge on this issue is clear, in that the plaintiff had actual notice of the non-compliance or contravention of the mandatory statutory requirement under s. 132C of the Companies Act at the time the SPA was executed on 10 November 1995. The side letter showed that the plaintiff had agreed to consciously waive the provision of s. 132C. The side letter therefore had invalidated the SPA. Such waiver

clearly contravenes the mandatory requirement under s. 132C and, pursuant to s. 24 of the Contracts Act, is invalid in law. (paras 30, 31, 32, 35)

(3) The SPA was not merely voidable at the option of the plaintiff as found by the Court of Appeal, but invalid and void. Consequently, the plaintiff cannot make any claim based on the terms of such void agreement. The SPA, although lawful on its face according to its own terms, was unlawful as it was performed in a manner which the law or statute prohibits. The plaintiff had knowingly participated in the contravention of the statutory requirement under s. 132C of the Companies Act and was therefore not entitled to the protection under the exception in subs. 3 of the section. (paras 35 & 36)

(4) The plaintiff was trying to enforce a void contract. The SPA became void when the mandatory statutory requirement of shareholders' approval was not obtained and was consciously waived by the parties at the time it was executed. Therefore, s. 66 of the Contracts Act came into play, *ie*, that the defendant who had received an advantage (10% deposit of RM1.6 million) under the void contract is bound to restore it to the plaintiff from whom he received it. (paras 40, 41 & 55)

(5) While we agree with the Court of Appeal on the refund of the 10% deposit of RM1.6 million to the plaintiff, we cannot agree on the award of interest thereon "at the rate of 8% per annum calculated from 10 February 1996 to the date of full settlement". The SPA was void from the day of its execution when both parties knowingly and consciously agreed for the waiver in the side letter. The 10% deposit was paid by the plaintiff with such background and it is therefore unconscionable for the plaintiff to be allowed interest from 10 February 1996 (the day after completion date). If at all interest is to be awarded on the 10% deposit, it should start from the date when the action was first filed by the plaintiff in the High Court. We would hence order for interest on the refunded deposit to be fixed at the rate of 8% p.a. calculated from 22 January 2002 until date of full settlement. (paras 43 - 46)

(6) *Rimba Muda* and *Sajan Singh* can be distinguished as both were dealing with situations where the disputed contracts, though found to be illegal, were fully executed and fully carried out by the parties. The situation in the present case is

different as: (i) the SPA was not completed by the completion date; (ii) a mandatory precondition statutory requirement under s. 132C of the Companies Act had not been obtained or fulfilled; (iii) the parties have not fully discharged their obligations under the SPA; and (iv) the subject matter of the sale, namely the transfer of the shares from the defendant to the plaintiff, had not yet been effected. (paras 48 - 50).

(7) By making the order for damages, the Court of Appeal was clearly enforcing the void SPA. There is no legal basis for that order. It is perfectly settled that where the contract which the plaintiff seeks to enforce is expressly or by implication forbidden by common law or statute, as in the present case, no court of law will lend its assistance and give effect to the same, more so when both parties to the contract, as here, had consciously and willingly agreed to the contravention of the law by not complying with the requirement of s. 132C. (para 54)

(8) Non-compliance or contravention of the mandatory statutory requirement under s. 132C of the Companies Act rendered the SPA void and not enforceable by law. The question of "vacant possession" therefore is no longer relevant. In the circumstances, we would answer the questions posed as follows: *viz*. that (a) the mandatory statutory provisions under s. 132C must be complied with and cannot be waived by agreement of the parties; (b) non-compliance or contravention of the requirement renders the contract void and invalid and not enforceable by law; (c) by virtue of s. 66 of the Contracts Act, the court of law may order restoration of whatever consideration or advantage paid or given under the contract; and (d) being a void contract, the court cannot order damages for breach of any term of the contract in favour of one of the contracting parties. (paras 58 & 59)

Bahasa Malaysia *Translation Of Headnotes*

Defendan (perayu) adalah pemilik kesemua saham-saham di dalam Choo Hoe Sdn Bhd (CHSB) yang memiliki hanya sebidang tanah di dalam bandar Kuala Lumpur sebagai asetnya. Melalui perjanjian bertarikh 10 November 1995 ('SPA'), defendan beraku untuk menjual keseluruhan pegangan sahamnya di dalam CHSB kepada plaintif untuk balasan RM16 juta. Plaintif membayar 10% deposit berjumlah RM1.6 juta dan berjanji untuk membayar baki harga pada atau sebelum tarikh penyempurnaan, 9 Februari 1996. Fakta

menunjukkan SPA menjadikan tarikh penyempurnaan sebagai tertakluk kepada dua syarat, iaitu kelulusan oleh Jawatankuasa Pelaburan Asing dan pemegang-pemegang saham defendan akan penjualan tersebut ('syarat duluan'). Bagaimanapun, melalui dokumen yang dimeterai plaintif bersekali dengan SPA ('surat sampingan'), plaintif telah melepaskan defendan dari tanggungjawabnya berkaitan dengan syarat duluan. Plaintif memeterai surat sampingan walaupun salah satu dari syarat di situ, iaitu kelulusan pemegang-pemegang saham defendan di Mesyuarat Agong Luarbiasa, adalah diwajibkan oleh s. 132C Akta Syarikat 1965 ('Akta Syarikat'). Salah faham berbangkit di antara pihak-pihak berhubung pelaksanaan tanggungjawab mereka masing-masing, berakibat, sehingga berakhirnya tarikh penyempurnaan, tiada bayaran baki ataupun penyerahan milikan kosong berlaku di antara plaintif dan defendan. Berikutnya, defendan menamatkan SPA dan merampas deposit. Pada 22 Januari 2002, plaintif telah memfail tindakan di Mahkamah Tinggi Kuala Lumpur menuntut pengembalian deposit, namun tidak berjaya. Adalah pandangan yang arif hakim Mahkamah Tinggi, dalam menolak tuntutan, bahawa pelepasan di dalam surat sampingan adalah sah dan berkuatkuasa dan bahawa kegagalan melaksanakan syarat duluan tidak menyebabkan SPA menjadi tak sah. Menurut yang arif hakim lagi, penyerahan milikan kosong hanyalah suatu waranti, berakibat kegagalan defendan menyerahkan milikan kosong pada tarikh penyempurnaan bukanlah merupakan suatu pelanggaran syarat SPA. Di rayuan, Mahkamah Rayuan bagaimanapun mengakas keputusan Mahkamah Tinggi, sekaligus memutuskan bahawa keperluan wajib statutori di bawah s. 132C Akta Syarikat adalah tidak boleh diabaikan, bahawa surat sampingan adalah batal dan tidak berkesan, bahawa SPA bukan tak sah tetapi hanyalah boleh menjadi tak sah atas pilihan plaintif, dan bahawa defendan telah melanggari SPA. Berikutan itu, Mahkamah Rayuan memerintahkan supaya deposit RM1.6 juta dipulangkan kepada plaintif dan supaya gantirugi ditaksir berserta dengan faedah pada kadar 8% setahun dikira dari 10 Februari 1996 (iaitu tarikh penyempurnaan) sehingga tarikh penyelesaian, atau, sebagai ganti taksiran, supaya defendan membayar plaintif RM3.2 juta sebagai gantirugi jumlah tertentu yang dipersetujui selaras dengan peruntukan fasal 11B SPA.

Di hadapan Mahkamah Persekutuan, kebenaran merayu telah diberi atas persoalan undang-undang berikut, iaitu: (i) sama ada, mengambilkira peruntukan s. 66 Akta Kontrak 1950 ('Akta Kontrak'), Mahkamah Rayuan boleh membuat perintah supaya gantirugi

ditaksir untuk plaintif atau sebagai gantinya menguatkuasakan fasal 11B SPA; dan (ii) sama ada 'milikan kosong' dalam sesuatu transaksi hartanah bermakna kebebasan dari rintangan fizikal yang besar yang sekaligus mengganggu sebahagian besar dari kenikmatan hartanah. Juga jelas bahawa, dalam usahanya untuk mencabar perintah restitusi yang dibuat oleh Mahkamah Rayuan di atas, defendan, antara lain, bergantung kepada autoriti-autoriti Mahkamah Persekutuan dan Majlis Privi masing-masing di dalam *Rimba Muda Timber Trading v. Lim Kuoh Wee ('Rimba Muda')* dan *Sajan Singh v. Sardara Ali ('Sajan Singh')*.

Diputuskan (membenarkan rayuan sebahagiannya; mengenepikan perintah berkaitan taksiran gantirugi berserta dengan faedah atau sebagai gantinya pembayaran RM3.2 juta sebagai gantirugi jumlah tertentu yang dipersetujui; mengesahkan perintah pemulangan 10% deposit kepada plaintif dengan pindaan bahawa faedah hendaklah dikira dari 22 Januari 2002 hingga ke tarikh penyelesaian)

Oleh Ramly Ali HMP menyampaikan penghakiman mahkamah:

(1) Kesan sub-seksyen 3 s. 132C Akta Syarikat yang lama dan baru ke atas status seorang pihak ketiga yang berurusan dengan sebuah syarikat adalah masih sama, iaitu ia akan kehilangan manfaat kaedah statutori s. 132C(1) jika ia mempunyai 'notis sebenar' mengenai pelanggaran atau ketidakpatuhan terhadap kehendak seksyen tersebut. Dengan kata lain, jika seorang pihak ketiga seperti plaintif mempunyai 'notis sebenar' berkaitan ketidakpatuhan terhadap s. 132C(1), maka ia tidak boleh bergantung kepada pengecualian di bawah s. 132C(3) untuk menguatkuasa transaksi atau perjanjian tersebut. Transaksi atau perjanjian sedemikian adalah tak sah dan batal (bukan voidable) terhadap semua termasuk pihak ketiga.

(2) Surat sampingan ditandatangani dengan persetujuan dan autoriti plaintif dan dimeterai dengan sahnya. Kesan dari dapatan yang arif hakim terhadap isu ini adalah jelas, iaitu bahawa plaintif mempunyai notis sebenar mengenai ketidakpatuhan atau pelanggaran terhadap kehendak wajib statut di bawah s. 132C Akta Syarikat semasa SPA dimeterai pada 10 November 1995. Surat sampingan menunjukkan bahawa plaintif secara sedar bersetuju untuk mengabaikan peruntukan s. 132C. Surat sampingan dengan itu telah

menyebabkan SPA menjadi tak sah. Pengabaian sedemikian melanggari kehendak wajib statut di bawah s. 132C dan berdasarkan s. 24 Akta Kontrak, adalah tak sah di sisi undang-undang.

(3) SPA bukan sahaja voidable atas pilihan plaintif seperti yang didapati oleh Mahkamah Rayuan, tetapi adalah tak sah dan terbatal. Oleh itu, plaintif tidak boleh membuat sebarang tuntutan berdasarkan kepada terma-terma perjanjian yang batal tersebut. SPA, walaupun sah atas permukaan berdasarkan terma-termanya sendiri, menjadi tak sah kerana dilaksanakan secara yang dilarang oleh undang-undang atau statut. Plaintif telah secara sedar terlibat dalam pelanggaran kehendak statutori di bawah s. 132C Akta Syarikat dan kerana itu tidak berhak kepada perlindungan di bawah pengecualian subseksyen 3 seksyen tersebut.

(4) Plaintif telah cuba untuk menguatkuasakan satu kontrak yang batal. SPA menjadi batal apabila keperluan wajib statutori, iaitu kelulusan pemegang saham, tidak diperolehi dan diabaikan dengan secara sedar oleh pihak-pihak semasa ianya dimeterai. Oleh yang demikian, s. 66 Akta Kontrak menjadi terpakai, yakni, bahawa defendan yang menerima suatu manfaat (10% deposit berjumlah RM1.6 juta) di bawah kontrak yang batal wajib memulangkannya kepada plaintif dari siapa ia menerima manfaat tersebut.

(5) Sementara kami bersetuju dengan Mahkamah Rayuan bahawa 10% deposit berjumlah RM1.6 juta hendaklah dikembalikan kepada plaintif, kami tidak boleh bersetuju dengan award faedah ke atas deposit "pada kadar 8% setahun dikira dari 10 Februari 1996 hingga ke tarikh penyelesaian". SPA adalah tak sah sejak dari hari ianya dimeterai bilamana pihak-pihak dengan pengetahuan dan kesedaran bersetuju kepada pengabaian melalui surat sampingan. Jumlah deposit 10% dibayar oleh plaintif kepada defendan berlandaskan latarbelakang ini dan dengan itu, ianya adalah tidak berhati budi untuk memberikan plaintif faedah dari tarikh 10 Februari 1996 (iaitu sehari selepas tarikh penyempurnaan). Jikapun faedah hendak diberikan ke atas deposit 10%, ia harus bermula dari tarikh bilamana tindakan difailkan oleh plaintif di Mahkamah Tinggi menuntut pengembalian deposit. Oleh itu, kami memerintahkan supaya faedah ke atas deposit RM1.6 juta yang dikembalikan ditetapkan pada kadar 8% setahun dikira dari 22 Januari 2002 hingga ke tarikh penyelesaian.

(6) *Rimba Muda* dan *Sajan Singh* boleh dibezakan kerana kedua-duanya berurusan dengan situasi di mana kontrak atau perjanjian yang dipertikai, walaupun didapati tak sah, telah dilaksanakan sepenuhnya oleh pihak-pihak terlibat. Keadaan dalam kes di sini adalah berbeza kerana: (i) SPA tidak disempurnakan pada tarikh penyempurnaan; (ii) satu syarat duluan wajib statutori yang diperlukan oleh s. 132C Akta Syarikat telah tidak diperolehi atau dipenuhi; (iii) pihak-pihak masih belum menunaikan sepenuhnya obligasi-obligasi mereka di bawah SPA; dan (iv) halperkara penjualan, yakni pemindahan saham-saham dari defendan kepada plaintif, masih lagi belum dibuat.

(7) Dengan membuat perintah untuk gantirugi, Mahkamah Rayuan dengan jelas telah menguatkuasakan SPA yang tak sah. Ianya sesuatu yang mantap bahawa di mana kontrak yang hendak dikuatkuasa oleh plaintif telah dilarang oleh undang-undang common atau statut sama ada secara ekpres atau tersirat, seperti yang berlaku di sini, maka tiada mahkamah undang-undang yang akan membantu memberi kesan kepadanya, lebih-lebih lagi bilamana kedua-dua pihak yang berkontrak, seperti halnya di sini, telah dengan sengaja dan relahati bersetuju dengan pelanggaran undang-undang dengan cara tidak mematuhi kehendak s. 132C.

(8) Ketidakpatuhan atau pelanggaran keperluan wajib statutori di bawah s. 132C Akta Syarikat menjadikan SPA tak sah dan tidak boleh dikuatkuasakan di sisi undang-undang. Oleh itu, persoalan "milikan kosong" sudah tidak lagi relevan. Dengan yang demikian, kami akan menjawab soalan-soalan yang dikemukakan seperti berikut, iaitu bahawa: (a) peruntukan wajib statutori di bawah s. 132C mesti dipatuhi dan tidak boleh diabaikan melalui perjanjian antara pihak-pihak; (b) ketidakpatuhan atau pelanggaran peruntukan ini akan menyebabkan kontrak menjadi tak sah dan batal dan tidak boleh dikuatkuasakan di sisi undang-undang; (c) bersandarkan kepada s. 66 Akta Kontrak, mahkamah undang-undang boleh memerintahkan pengembalian apa jua balasan atau manfaat yang diberi atau dibayar di bawah kontrak; dan (d) memandangkan kontrak adalah tak sah, mahkamah tidak boleh memerintahkan gantirugi atas pelanggaran mana-mana terma kontrak kepada salah satu pihak-pihak yang berkontrak.

Case(s) referred to:
Ahmad Udoh & Anor v. Ng Aik Chong [1969] 1 LNS 4 HC ***(refd)***
Chase Perdana Bhd v. Md Afendi Hamdan [2009] 6 CLJ 501 FC ***(refd)***
Cope v. Rowlands [1836] 2 M & W 149 ***(refd)***
Harnath Kaur v. Inder Singh [1922] LR 50 1A 69 ***(refd)***
Holman v. Johnson [1775] 98 ER 1120 ***(refd)***
Hughes and others v. Asset Managers [1995] 3 All ER 669 ***(refd)***
K/S Lincoln v. CB Richard Ellis Hotels Ltd [2009] EWHC 2344 ***(refd)***
Menaka v. Lum Kum Chum [1976] 1 LNS 181 PC ***(refd)***
National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 FC ***(refd)***
Rimba Muda Timber Trading v. Lim Kuoh Wee [2006] 3 CLJ 93 FC ***(dist)***
Sajan Singh v. Sardara Ali [1959] 1 LNS 90 PC ***(dist)***
Yango Pastoral Co Pty Ltd v. First Chicago Australia Ltd [1978] 139 CLR 410 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 132C(1), (3)
Companies (Amendment) Act 2007, s. 132C(1)(b), (3), (5)
Contracts Act 1950, ss. 2(g), 24, 54, 55, 66
Moneylenders Ordinance 1951, s. 8

Indian Contract Act 1872 (Ind), s. 65

For the appellant/defendant - Loh Siew Cheang (Yap Mong Jay with him); M/s Cheang & Ariff
For the respondent/plaintiff - Gopal Sri Ram (Harpal Singh Grewal, Amrit Pal Singh & Reny Rao with him); M/s Al Nathan

[Editor's note: For the Court of Appeal judgment, please see Code Focus Sdn Bhd v. Tan Chee Hoe & Sons Sdn Bhd [2013] 4 CLJ 1053.]

Reported by Wan Sharif Ahmad

JUDGMENT

Ramly Ali FCJ:

[1] The appellant, Tan Chee Hoe & Sons Sdn Bhd, was the defendant in the High Court, and the respondent, Code Focus Sdn Bhd, was the plaintiff there. For the purpose of this judgment, the appellant will be referred to as the defendant and the respondent as the plaintiff, as they were referred to at the High Court.

[2] The present appeal before us is by the defendant against the unanimous decision of the Court of Appeal on 14 August 2012 in allowing the plaintiff's appeal against the decision of the High Court, and ordering the defendant to refund the plaintiff's deposit of RM1.6 million and damages to be assessed or alternatively the defendant to pay the plaintiff damages in the sum of RM3.2 million as agreed liquidated damages stipulated in the sale and purchase agreement ('SPA') dated 10 November 1995 between the parties.

[3] On 23 May 2013, leave to appeal was granted by this court to the defendant on the following questions of law, namely:

(i) where the Court of Appeal makes a decision on a subject matter affecting the rights and liabilities of litigants based on a non-existing statutory provision, whether or not the Federal Court should, as a matter of course, review that decision as a whole on appeal proper by granting leave to appeal?;

(ii) where contracting parties waive a mandatory statutory provision prior to the entering of a contract, whether a court of law may order restoration of consideration paid under that contract and further order damages for breach of contract in favour of one of the contracting parties notwithstanding s. 66 of the Contracts Act 1950?; and

(iii) where in law the expression 'vacant possession' concerning property transactions means freedom from physical impediment which substantially interferes with the enjoyment of substantial part of a property or any physical impediment however slight and affecting any part of the property however insubstantial?.

Factual Background

[4] The defendant (as vendor) had entered into an agreement dated 10 November 1995 with the plaintiff (as purchaser) for the purchase of the total issued and paid-up shares of Choo Hoe Sdn Bhd ('CHSB') which comprised of 931,002 ordinary shares for a purchase price of RM16 million (the SPA). The plaintiff had agreed to purchase the said shares because it was interested in a piece of land owned by CHSB. The land in question was to a piece of freehold land measuring 1a or 24.5 poles (50,230 sq. ft.) held under certificate of title No. 12920 Lot 92, Section 46 in the Town of Kuala Lumpur along Jalan Putra (the said land). The said land was the only asset/property of CHSB.

[5] Pursuant to the SPA the plaintiff paid the defendant 10% deposit of RM1.6 million. The balance 90% of the purchase price was to be paid on or before 9 February 1996 (the completion date). Other salient terms of the SPA are as follows:

(a) the balance purchase price was to be paid to the defendant on or before the completion date (cl. 2.2(c));

(b) the completion of the SPA was subject to two conditions precedent, namely: (i) approval of the foreign investment committee ('the FIC') within 75 days from the date of the SPA; and (ii) approval of the defendant's shareholders in an extraordinary general meeting ('EGM') approving the sale of the shares to the plaintiff (cl. 3.5);

(c) the defendant was to evict all squatters at its own costs and deliver vacant possession of the said land judgment of the court: in question to the plaintiff by the completion date (Recital I and cl. 8.1(21)(d));

(d) the defendant was to refund the deposit in the event the FIC approval was not obtained (cl. 3.4);

(e) in the event the plaintiff failed to pay the balance of the purchase price on or before the completion date, the SPA shall automatically terminate and the defendant shall be entitled to forfeit the deposit (cl. 11A); and

(f) time shall be the essence of the SPA (cl. 12.11).

[6] It is not in dispute that there were several encroachments on the said land. The plaintiff averred that in breach of cl. 8.1 of the SPA, the defendant had failed to remove the encroachments or prepare for delivery of vacant possession of the said land on or before the completion date to the plaintiff.

[7] The balance of the purchase price was not paid by the plaintiff to the defendant by the completion date. Consequently the defendant treated the SPA as having been terminated by virtue of cl. 11A of the SPA, and in accordance with the terms of the SPA, the 10% deposit of RM1.6 million already paid by the plaintiff was forfeited by the defendant.

[8] The plaintiff disputed the forfeiture of the deposit. It claimed that the defendant was in breach of its obligations under the SPA, as it had failed to deliver vacant possession of the said land in question to the plaintiff by the completion date and therefore the plaintiff's obligation to pay the balance of the purchase price did not arise.

[9] The plaintiff also claimed that the defendant had failed, refused and/or neglected to fulfill the conditions precedent ie, to get the approval of the FIC within 75 days from the date of the SPA; and the approval of the defendant's shareholders in an EGM approving the sale of the shares to the plaintiff.

[10] The defendant on the other hand claimed that all the encroachments on to the said land had been removed by the completion date and it was ready to deliver vacant possession on that date. In any event, the defendant contended that the obligation to deliver vacant possession of the said land was only a warranty.

[11] As for the two conditions precedent, the defendant contended that such obligation to perform them had been waived by a side letter dated 10 November 1995 issued by the plaintiff to the defendant.

The Plaintiff's Suit: At The High Court

[12] The plaintiff commenced the present suit in the Kuala Lumpur High Court on 22 January 2002. After a full trial, the learned High Court Judge dismissed the plaintiff's claim with costs. In her judgment, the learned High Court Judge made the following findings, namely:

(a) that on the balance of probabilities, the side letter dated 10 November 1995 (the same date when the SPA was executed) was in fact signed with the authority or approval of the plaintiff and therefore the waiver was valid and effective where the parties had in fact agreed to waive the performance of the conditions precedent and that there was no legal impediment to such waiver; and the nonperformance of the conditions precedent did not cause the SPA to be void;

(b) that on the issue of vacant possession, the defendant was able to deliver vacant possession of the said land to the plaintiff on the completion date; and in any event, the failure to deliver

vacant possession of the said land on the completion date did not amount to a breach of condition of the SPA; it was only a breach of warranty; and

(c) that, in the circumstances of the case, upon the failure of the plaintiff to pay the balance of the purchase price as required by cl. 2.2(c), the provisions of cl. 11A kicked in and the SPA became automatically determined and the deposit became absolutely forfeited to the defendant. There was therefore no issue of any act of termination or forfeiture by the defendant; and the forfeiture of the deposit was therefore lawful and in accordance with the terms of the SPA.

At The Court Of Appeal

[13] The Court of Appeal, after hearing submissions from both sides, unanimously reversed the decision of the High Court. In doing so, the Court of Appeal *inter alia* made the following findings, namely:

(a) that the side letter dated 10 November 1995 (exh. P5) was void by virtue of s. 132C of the Companies Act 1965 and the mandatory statutory requirement of the section could not be waived by agreement of the parties; therefore cls. 3.1 to 3.6 of the SPA (which were allegedly waived by the side letter) were thus operative and the conditions precedent had to be complied with; bereft of the compliance, the SPA became voidable at the option of the plaintiff and the plaintiff was entitled to the refund of the deposit and to obtain damages;

(b) reading the terms of the SPA, the plaintiff need not pay the balance of the purchase price by the completion date because on that date, the defendant could not deliver vacant possession of the said land to the plaintiff in breach of cl. 8.1 of the SPA; and

(c) that it was unconscionable to allow the defendant to retain the deposit on the ground that there was a fundamental breach by the defendant in not delivering vacant possession of the said land by the completion date which went to the root of the agreement coupled with the voidability of the SPA at the instance of the plaintiff.

[14] For the various reasons as highlighted in the judgment, the Court of Appeal unanimously allowed the plaintiff's appeal with costs of RM50,000, and made an order for the deposit of RM1.6

million together with interest at the rate of (8%) per annum calculated from 10 February 1996 to the date of full settlement or *in lieu* of assessment, the sum RM3.2 million as agreed liquidated damages, which was stipulated in cl. 11B of the SPA to be paid by the defendant to the plaintiff.

At The Federal Court

[15] Before us, the defendant raised two issues, namely:

(a) where contracting parties waive a mandatory statutory requirement to the entering of a contract, whether a court of law may order refund or return of consideration paid under that contract and further order damages for breach of contract in favour of one of the contracting parties notwithstanding s. 66 of the Contracts Act 1950?

(b) whether in law the expression 'vacant possession' concerning property transaction means freedom from physical impediment which substantially interferes with the enjoyment of substantial part of the property or any physical impediment however slight and affecting any part of the property however insubstantial?

[16] Learned counsel for the defendant, submitted at the outset that the statutory principles contained in s. 132C of the Companies Act 1965 would determine the appeal before the court; and the legal principles explained by the Federal Court in *Rimba Muda Timber Trading v. Lim Kuoh Wee* [2006] 3 CLJ 93; [2006] 4 MLJ 505 as well as ss. 2(g), 24 and 66 of the Contracts Act 1950, will determine the propriety of the orders on recovery of deposit and substantial damages, made by the Court of Appeal in the plaintiff's favour.

[17] To strengthen its argument, learned counsel for the defendant relied on the following contentions, namely:

(a) the Court of Appeal erred in law in finding that in the absence of shareholders' approval for the disposal of substantial assets of a company, the underlying transaction or contract is only 'voidable' under s. 132C; and in law, the provisions of s. 132C(3) expressly specified that in consequence of its non-compliance the contract is 'void', simply upon the fact of absence of shareholders' approval as required under s. 132C(1);

(b) the Court of Appeal erred in law in not giving effect to the statutory requirement under s. 132C(3) whether the plaintiff had 'actual notice' of the contravention of s. 132C or had consciously contravened the same, a necessary issue for the purpose of ascertaining the availability of the exception to the plaintiff provided for in s. 132C(3) and right to restitution and damages; and

(c) the Court of Appeal erred in law in assisting the plaintiff, a willing and knowing participant to a breach of s. 132C, by ordering restitution and payment of substantial damages or *in lieu* thereof, liquidated damages in its favour, contrary to the common law, s. 24 and s. 66 of the Contracts Act 1950.

[18] In his submissions, learned counsel for the plaintiff agreed that the requirement to obtain shareholders' approval was a mandatory statutory requirement under s. 132C(1) of the Companies Act 1965 and must be complied with even if not contractually provided for. The plaintiff further submitted that "it is undisputed that the need to obtain the defendant's shareholders' approval for the sale of the shares was a condition precedent to the SPA; it is a well-established principle of law that if a condition precedent is not fulfilled and/or satisfied, then there is no valid contract". However, the plaintiff contended that the Court of Appeal was correct in giving effect to ss. 54 and 55 of the Contracts Act 1950 which provide that the party that prevents the other party from performing its promise is liable to compensate the other party for any loss which it may sustain.

[19] In supporting the Court of Appeal's decision, the plaintiff argued that the defendant had breached two fundamental terms of the SPA ie, failure to obtain shareholders' approval and failed to deliver vacant possession of the said land to the plaintiff. On that premise, the plaintiff claimed that the defendant had no right to forfeit the plaintiff's 10% deposit of RM1.6 million and the plaintiff is entitled to the agreed liquidated damages as provided for in the SPA.

Section 132C Of The Companies Act 1965

[20] We shall now deal with the provisions of s. 132C of the Companies Act 1965; its intended purpose, scope, and the effect of its non-compliance. The current s. 132C provides:

A

132C. Approval of company required for disposal by directors of company's undertaking or property

(1) Notwithstanding anything in the memorandum or articles of association of the company, the directors shall not carry into effect any arrangement or transaction for:

B

(a) the acquisition of an undertaking or property of a substantial value; or

(b) the disposal of a substantial portion of the company's undertaking or property, unless the arrangement or transaction has been approved by the company in a general meeting.

C

(1A) For the purpose of subsection (1), in the case of a company where all or any of its shares are listed for quotation on the official list of a Stock Exchange as defined in the Securities Industry Act 1983, the term 'substantial value' or 'substantial portion' shall mean the same value prescribed by the provisions in the listing requirements of the Exchange:

D

(a) which relates to acquisitions or disposals by a company or its subsidiaries to which such provision applies; and

E

(b) which would require the approval of shareholders at a general meeting in accordance with the provisions of such listing requirements.

F

(1B) In the case of any company other than a company to which subsection (1A) is applicable, an undertaking or property shall be considered to be of a substantial value and a portion of the company's undertaking or property shall be considered to be a substantial portion if:

G

(a) its value exceeds twenty-five per centum of the total assets of the company;

(b) the net profits (after deducting all charges except taxation and excluding extraordinary items) attributed to it amounts to more than twenty-five per centum of the total net profit of the company; or

H

(c) its value exceeds twenty-five per centum of the issued share capital of the company, whichever is the highest.

I

(2) The Court may, on the application of any member of the company, restrain the directors from entering into a transaction in contravention of subsection (1).

(3) Where an arrangement or transaction is carried into effect in contravention of subsection (1), the arrangement or transaction shall be void except in favour of any person dealing with the company for valuable consideration and without actual notice of the contravention.

(4) This section shall not apply to proposals for disposing of the whole or substantially the whole of the company's undertaking or property made by a receiver and manager of any part of the undertaking or property of the company appointed under a power contained in any instrument or by a Court or a liquidator of a company appointed in a voluntary winding up.

(5) Any director who contravenes the provision of this section shall be guilty of an offence against this Act. Penalty: Imprisonment for five years or thirty thousand ringgit or both.

(6) In this section, "director" includes the chief executive officer, the chief operating officer, the chief financial controller or any other person primarily responsible for the operation or financial management of a company, by whatever name called.

[21] The current s. 132C was inserted by the Companies (Amendment) Act 2007 (Act A1299/07) which came into effect on 15 August 2007. Under the provisions of the sub-s. (1)(b) directors cannot carry into effect any proposal or execute any transaction for the disposal of a substantial portion of the company's undertaking or property unless the arrangement or transaction has been approved by the company in a general meeting. The approval of the shareholders in a general meeting must first be obtained before the transaction or disposal is carried into effect. A transaction or disposal entered into in contravention of this subsection is invalid and void except in favour of any person dealing with the company for valuable consideration and without actual notice of the contravention. Any director of a company who contravenes this section shall be guilty of an offence and liable to imprisonment for five years or a RM30,000 fine or both. This statutory requirement is mandatory, notwithstanding anything in the company's memorandum or articles of association. If the directors decide to make a disposal of a substantial portion of the company's undertaking or property, a disclosure of the proposed transaction must be made to the shareholders to enable the shareholders to make an informed decision on the transaction in a general meeting.

[22] Section 132C(1) statutorily emplaces that *intra vires* power of disposal of company's substantial property and undertaking in the hand of the shareholders at the general meeting and declares transaction as 'invalid' and 'void' without such shareholders' approval. In actual fact, shareholders are 'owners' of a company. They raise capital for operational requirement of the company as a going concern, while directors, who may or may not be shareholders are only involved in the day to day management of the company.

[23] Under the present sub-s. (3), an arrangement or transaction carried into effect in contravention of sub-s. (1) "shall be void except in favour of any person dealing with the company for valuable consideration and without actual notice of the contravention." However, under the amended 1987 provisions, a transaction entered into in contravention of section (1) "shall, in favour of any person dealing with the company for valuable consideration, and without actual notice of the contravention, be as valid as if that subsection has been complied with." In effect the present sub-s. (3) changed the wordings of the exception from the positive approach to the negative approach. The present provisions were to make clear on issue of ambiguity that relates to the penalty in criminal liability on directors who fail to comply with the mandatory prohibition of sub-s. (1), as stipulated under sub-s. (5). In effect the new sub-s. (3) penalizes contravening directors regardless of whether a third party in dealing with the company for valuable consideration had actual notice or not of the contravention.

[24] However, the effect of both the provisions on the status of a third party dealing with the company is still the same ie, it loses the benefit of the statutory rule in s. 132C(1) if it had 'actual notice' of the contravention or noncompliance of the requirement. In other words if a third party (in this case the plaintiff) had 'actual notice' of the non-compliance of s. 132C(1), then it cannot rely on the exception under s. 132C(3) to enforce the transaction or agreement in question (in this case is the SPA dated 10 November 1995); and the transaction or agreement is void, and invalid (not voidable) as against the whole world as well as the third party (the plaintiff). (Under s. 2(g) of the Contracts Act 1950 a 'void' agreement cannot be enforceable by law; while 'voidable' agreement is only enforceable by law at the option of one or more of the parties, but not at the option of the other).

[25] In the present case, it is not in dispute that the transaction or agreement between the plaintiff and the defendant involved an agreement to dispose of a substantial portion of the defendant's asset or property ie, the total issued and paid up shares of CHSB for a purchase price of RM16 million, by the defendant (as vendor) to the plaintiff (as purchaser). It is also not in dispute that the mandatory requirement of shareholders' approval under s. 132C(1) of the Companies Act 1965 had not been obtained by the defendant, by the completion date.

[26] In order to determine the validity of the SPA, the issue which must be considered is whether the plaintiff (as the third party dealing with the defendant company) came under the exception to the 'void' rule under s. 132C(3). The pertinent question to ask is whether the plaintiff had 'actual notice' of the non-compliance. If it had 'actual notice' of the non-compliance of s. 132C, then, the exception does not apply and the result is clear – that the SPA is void and invalid; and cannot be enforced by the plaintiff. When an agreement is void or invalid the whole agreement is void; and the whole agreement cannot be enforceable by law (see: s. 2(g) of the Contract Act 1950).

[27] The defendant relied on the contents of the side letter dated 10 November 1995 issued by the plaintiff and addressed to the defendant. The side letter was issued contemporaneously ie, on the same date with the execution of the SPA. To better understand the effect of the side letter, we shall reproduce its contents in full:

CODE FOCUS SDN BHD
NO. 9 JALAN DORAISAMY, OFF JALAN DANG WANGI
50300 KUALA LUMPUR
TEL: 03-2985288 FAX: 03-2985028

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10 November 1995

TAN CHEE HOE & SONS SDN BHD
Nos. 6 & 8 Jalan Gereja [2nd Floor]
50100 Kuala Lumpur

Dear Sirs,

A Re: Sale Purchase Agreement dated 10 November 1995
Subject matter : Sale and Purchase of Shares of Choo Hoe Sdn Bhd
Vendor : Tan Chee Hoe & Sons Sdn Bhd
Purchaser : Code Focus Sdn Bhd

B _____

We refer to the above matter.

Pursuant to our discussions, we hereby agree that clauses 3.1, 3.2, 3.3, 3.4, 3.5 and 3.6 of the Sale and Purchase Agreement C shall no longer apply.

We enclosed herewith our banker's cheque MBB No. 012408 for RM1,440,000.00 favouring your Solicitors M/S P.G. Lim & Co. which together with the earlier payment of RM160,000.00 shall form the deposit payment of 10%. D

Yours faithfully,

CODE FOCUS SDN BHD

sgd	sgd
E ...	...
DIRECTOR	We, Tan Chee Hoe & Sons Sdn Bhd hereby agree to the
F	abovementioned terms and hereby acknowledge receipt of the banker's cheque

[28] The High Court, after hearing the witnesses and evaluating G the evidence given during trial, found that the side letter was signed with the plaintiff's approval and authority; and that it had been validly executed. The learned judge concluded that "the parties had in fact agreed to waive the performance of the conditions precedent by way of a valid side letter signed on H 10 November 1995, and that there was no legal impediment to such waiver ... the non-performance of the conditions precedent did not therefore cause the SPA to be void."

[29] The Court of Appeal reversed this finding and maintained I that mandatory statutory requirements under s. 132C of the Companies Act 1965 cannot be waived. The Court of Appeal

held that the side letter "is ineffective and void" and further held that the SPA was 'voidable' at the plaintiff's option. Accordingly, the Court of Appeal found that the defendant had breached the SPA and it must refund the 10% deposit of RM1.6 million and pay damages to be assessed, or *in lieu* thereof, the agreed liquidated damages of RM3.2 million as stipulated in the SPA, to the plaintiff.

[30] As found by the learned High Court Judge, the side letter was in fact signed with the plaintiff's approval and authority; and was validly executed. The learned judge was satisfied that the side letter was signed by one Mr Ng Chen Foo, a director of the plaintiff, who was present at the time when the SPA was to be signed. In short, the effect of the finding of the learned High Court Judge on this issue is clear that the plaintiff had actual notice of the noncompliance or contravention of the mandatory statutory requirement under s. 132C at the time when the SPA was executed on 10 November 1995. The side letter in effect shows that the plaintiff had agreed to consciously waive the provision of s. 132C. Therefore, we are of the view that the side letter invalidated the SPA. Such waiver clearly contravenes the mandatory requirement under s. 132C and invalid in law.

[31] The authorities on this matter are clear. Section 24 of the Contracts Act 1950 stipulates in effect that the consideration or object of an agreement is unlawful if it is forbidden by law or if it is such a nature that if permitted, would defeat any law. Every agreement of which the object or consideration is unlawful is void; and a void contract cannot be enforceable by law.

[32] His Lordship Parke B in *Cope v. Rowlands* [1836] 2 M & W 149 at p. 157; had stated:

> It is perfectly settled, that where the contract which the Plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common law or statute, no court will lend its assistance to give effect.

The above principle was adopted by Hirst LJ in *Hughes and others v. Asset Managers* [1995] 3 All ER 669.

[33] To knowingly and consciously waive the mandatory statutory requirement of s. 132C of the Companies Act 1965 is unlawful. The court of law will not entertain such unlawful act by allowing

claim based on the void agreement. The same principle was adopted by Coulson J in *K/S Lincoln v. CB Richard Ellis Hotels Ltd* [2009] EWHC 2344 where it was held that "it seems clear that the underlying principle or policy is one of deterrence; that the courts will not encourage illegal acts by allowing claim based upon them."

[34] The Federal Court in *Chase Perdana Bhd v. Md Afendi Hamdan* [2009] 6 CLJ 501; [2009] 6 MLJ 783 had affirmed and adopted the same principle as follows:

> The law on this is quite established. Once it is enacted by legislation that parties are required to comply with any provision, parties must comply with such provision. It is not for any person to waive legislative requirements by an agreement unless the legislation allows it to be done. Legislation enacts laws which in its opinion are for the benefit of the public. It is not for the courts, or anybody for that matter, to say that it need not be followed.

[35] The interest of the shareholders of the defendant company, must be protected. That is the intention of s. 132C of the Companies Act 1965; particularly as in the present case there were a number of shareholders of the defendant company at the material time. The shareholders then were Tan Eng Teong, Tan Tack Lin, Tan Eng How, the Estate of Tan Chee Hoe and Tan Eng Sin (Tan Eng Teong, Tan Teck Lin and Datin Chan Woi Choo as trustees).

[36] Based on the above considerations, it is clear that the SPA in question was not merely voidable at the option of the plaintiff as found by the Court of Appeal but invalid and void. The plaintiff cannot make any claim based on the terms of the said void agreement. The SPA, although lawful on its face according to its own terms, was unlawful as it was to be performed in a manner which the law or statute prohibits. (see: *Yango Pastoral Co Pty Ltd v. First Chicago Australia Ltd* [1978] 139 CLR 410). The plaintiff had knowingly participated in the contravention of the statutory requirement under s. 132C; and therefore not entitled to the protection under the exception in sub-s. (3).

Section 66 Of The Contracts Act 1950

[37] The effect of a void contract or agreement is provided for under s. 66 of the Contracts Act 1950, which reads:

> 66. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

[38] The facts of the present case do fit the meaning of the words "discovered to be void" or "becomes void" as found in s. 66 above. The Privy Council in *Harnath Kaur v. Inder Singh* [1922] LR 50 1A 69 in considering a claim based on s. 65 of the Indian Contract Act 1872 (which was identical to our s. 66 of the Contracts Act 1950) ruled:

> an agreement, therefore, discovered to be void is one discovered to be not enforceable by law, and on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void.

The above principle was followed by Wan Suleiman J in *Ahmad Udoh & Anor v. Ng Aik Chong* [1969] 1 LNS 4; [1969] 2 MLJ 116.

[39] A right to restitution may arise out of a failure of a contract though the right itself be not a matter of contractual obligation. It appears to be based on the principle exemplified in the Roman Law '*condictio causa data causa non secuta*' (contract becoming impossible to perform owing to the outbreak of war in 1914). The Privy Council in *Menaka v. Lum Kum Chum* [1976] 1 LNS 181; [1977] 1 MLJ 91, in dealing with s. 65 of the Indian Contracts Act 1872 (which is identical to our s. 66 of the Contracts Act 1950) ruled:

> In that way effect will be given to section 65 under which each party is bound to restore any advantage which he has received to the person from whom he received it – see *Govindram Seksaria v Radbone* where Lord Morton of Henryton said:
>
> > The result of section 65 of the Indian Contract Act was that, as from [the date on which the contract became void] each of the parties became bound to restore to the other any advantage which the restoring party had received under the contract of sale.

[40] The plaintiff in the present case, expressly based its entire claim on the terms of the SPA. The plaintiff, *inter alia*, alleged that the defendant was in breach of the said SPA in failing to deliver vacant possession of the said land in question to the plaintiff; and to obtain shareholders' approval under s. 132C of the Companies Act 1965 on or before the completion date, as stipulated in various clauses of the SPA. At the same time, the plaintiff expressly in para. 12 of its statement of claim claimed that it was "at all material times ready, willing and able to honour its obligations under the SPA, subject to the SPA becoming unconditional ..." Clearly, the plaintiff in this case, was trying to enforce a void contract.

[41] The SPA in this case became void when the mandatory statutory requirement of shareholders' approval was not obtained and was consciously waived by the parties at the time when it was executed. Therefore, s. 66 of the Contracts Act 1950 came into play ie, that defendant who had received an advantage (in the form of the 10% deposit of RM1.6 million) under the void agreement or contract (the SPA) is bound to restore it to the plaintiff from whom he received it.

[42] The failure of an agreed or statutory condition precedent frees contracting parties from their further obligations. The contract become void. The decision of the Federal Court in *National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd* [1983] 2 CLJ 76; [1983] CLJ (Rep) 282; [1983] 2 MLJ 211 is enlightening on this issue. In that case, it was held that:

> whether it is held that the requirement as to approval is a contingent condition or as a mere promissory condition the result would not be different. In the first case there was no agreement to enforce until the requirement was satisfied and the deposit was returnable under the provision of the agreement itself as there was no ground for withholding it any longer; whereas in the second case although there was a subsisting contract it was however defeated or frustrated by a supervening event, which is non-fulfilment of the requirement and in this case also the deposit was refundable as money had and received for the use of the Appellants who had paid it.

[43] On this issue, we are in agreement with the Court of Appeal that the 10% deposit of RM1.6 million was to be refunded by the defendant to the plaintiff. However we cannot agree on the issue

of interest on the deposit "at the rate of (8%) per annum calculated from 10 February 1996 to the date of full settlement" as ordered by the Court of Appeal.

[44] In this case, the SPA was void right from the day of its execution (10 November 1995) when both parties knowingly and consciously agreed for the waiver in the side letter of the same date. The 10% deposit of RM1.6 million was willingly paid by the plaintiff to the defendant with that background. It is unconscionable for the plaintiff to be allowed interest from the date 10 February 1996 as fixed by the Court of Appeal. (apparently, the date 10 February 1996 was based on the completion date of the SPA – 9 February 1996).

[45] The award of interest is a discretion of the court. If at all an interest is to be awarded on the 10% deposit, it should start from the date when the action was first filed by the plaintiff at the High Court, claiming for the refund of the deposit. The Privy Council in *Menaka v. Lum Kum Chum* (*supra*) had the opportunity to deal with the same issue ie, on the issue of interest to be awarded on the refund of money paid under a void or illegal contract which had contravened the provision of s. 8 of the Moneylenders Ordinance 1951. Lord Fraser of Tullybelton, delivering the judgment of the board, aptly said:

> Their Lordships therefore do not consider that it would be right to award interest from a date before the institution of these proceedings. But after that date different considerations apply and the award of interest is a matter for the discretion of the court. It is true that apparently *Harnath Kaur*, (*supra*) was cited before Mohamed Azmi J, but the learned judge gave no reason for not awarding any interest and their Lordships therefore do not consider that he can be taken to have exercised his discretion on the point. The Federal Court made an award of interest at 6% from the date of raising the action (February 17, 1971) after reference to *Harnath Kaur*, (*supra*) and they clearly did exercise their discretion. Their Lordships see no reason to think that the Federal Court committed any error of law in their exercise and they will therefore not interfere with the decision of the Federal Court on this point. The result is that the Respondent is bound to pay to the Appellant the sum of $19,400 with interest at 6% from February 17, 1971.

[46] Applying the above principle, we are of the view that the interest to be awarded for the refunded deposit of RM1.6 million to the plaintiff should be at the rate of (8%) per annum calculated from the date when the writ was filed in the High Court by the plaintiff on 24 January 2002 until the date of full settlement.

[47] Learned counsel for the defendant in challenging the restitution order made by the Court of Appeal referred to the ruling of the Federal Court in *Rimba Muda Timber Trading v. Lim Kuoh Wee* [2006] 3 CLJ 93; [2006] 4 MLJ 505. In that case, the plaintiff filed an action against the defendant for trespass and conversion relating to timber concession area in Pahang. The High Court dismissed the claim, however on appeal the Court of Appeal allowed the claim for conversion and directed that damages be assessed by the SAR of the High Court. On appeal to the Federal Court, the defendant contended that the property in the logged timber could not in law pass to the plaintiff on the ground that the underlying contract with the licence holder was illegal being in breach of the provisions of the National Forestry Act 1984. The Defendant's appeal to the Federal Court was dismissed. In doing so, the Federal Court made *inter alia* the following rulings:

> (a) the fact that the contract was illegal would not prevent the property in the logged timber passing to the Respondent who had fully paid for the timber. In the circumstances, this court therefore agree with the Court of Appeal that even if the contract was illegal that did not prevent the property right in the logs from being vested in the Respondent. The claim by the Respondent could not be defeated purely on the ground that the relevant contract was illegal as the Respondent did not ground his claim on the illegal contract. The Respondent here merely relied on the contract as a basis for his claim to the property right in the logs; and
>
> (b) in an action founded on the tort of conversion, property rights could pass under a contract even though the contract is tainted with illegality, provided that the action is not grounded on the illegal contract.

[48] Our view is that *Rimba Muda* can easily be distinguishable from the present case. In *Rimba Muda* the cause of action was based on tort of conversion where the contract in question was fully concluded and executed by the parties concerned. The plaintiff had fully paid for the timber; and the plaintiff had fully discharged his part of the bargain and there was nothing more for

him to do under the contract. On this context, the Federal Court affirmed that the contract "was fully executed once the plaintiff paid the full sum of RM140,000 to Chan and the property right in the logs immediately passed to the respondent (plaintiff) upon the issuance of the license to extract the timber to the licence holder."

[49] The Federal Court in that case also referred to the Privy Council's case of *Sajan Singh v. Sardara Ali* [1959] 1 LNS 90; [1960] MLJ 52 (PC) (which was also cited by learned counsel for the defendant in the present appeal in supporting that restitution or refund of deposit is barred in such circumstances). In that case, the Privy Council held, *inter alia*, that although the transaction between the plaintiff and the defendant was illegal being in contravention of certain regulations governing the transfer and use of motor vehicles, nevertheless it was fully executed and carried out and on that account it was effective to pass the property in the lorry to the plaintiff. Lord Denning in delivering decision of the board that restitution is barred, said:

> The reason is because the transferor, having fully achieved his unworthy end, cannot be allowed to turn round and repudiate the means by which he did it – he cannot throw over the transfer. And the transferee, having got the property, can assert his title to it against all the world, not because there is not one who can assert a better title to it. The court does not confiscate the property because of the illegality – it has no power to do so – so it says, in the words of Lord Eldon: "Let the estate lie where it falls.

[50] Both *Rimba Muda* and *Sajan Singh* dealt with situation where the contracts or agreements in dispute, though found to be illegal, were fully executed and fully carried out by the parties. The contract was fully concluded and completed; and the plaintiff "had fully discharged his part of the bargain and there was nothing more for him to do". The situation in the present case before us is different and distinguishable. Here, the SPA was not completed by the completion date; a mandatory pre condition statutory requirement under s. 132C of the Companies Act 1965 had not been obtained or fulfilled; the parties have not fully discharged their obligations under the SPA; and the subject matter of the sale ie, the transfer of the shares of CHSB from the defendant

(as vendor) to the plaintiff (as purchaser) had not been affected yet. There was no binding agreement to be enforced until the requirement was satisfied and fulfilled.

[51] The Court of Appeal, after finding that the mandatory statutory requirement under s. 132C of the Companies Act 1965 could not be waived by agreement of the parties had erroneously found that "bereft of that compliance, the SPA become voidable at the option of the plaintiff and the plaintiff was entitled to the refund of the deposit and to obtain damages." In the grounds of judgment of the Court of Appeal, it is stated:

> [54] Clause 12.11 of the SPA stipulates that time is of the essence. That being the case, we will activate section 56 of the Contracts Act 1950. This section states that when time is of the essence and the contractual obligation is not performed on the stipulated time frame, the contract is voidable at the option of the promisee.
>
> [55] As alluded to earlier, the Defendant's contractual obligation under the SPA was to deliver vacant possession on the completion date because time was of the essence and an essential condition of the SPA. And the failure of the Defendant to deliver vacant possession of the land to the Plaintiff on the completion date, made the SPA voidable at the Plaintiff's option.

The SPA was void, not voidable at the option of the plaintiff.

[52] In allowing the appeal by the plaintiff, the Court of Appeal made a further order that the defendant to pay the plaintiff damages to be assessed by the Registrar of the High Court together with interest at the rate of eight (8%) percent per annum calculated from 10 February 1996 to the date of full settlement or *in lieu* of assessment, the sum of RM3.2 million as agreed liquidated damages, which was stipulated in cl. 11B of the SPA to be paid by the defendant to the plaintiff.

[53] The issue before us now is whether the Court of Appeal could make such an order for damages to be assessed in favour of the plaintiff or *in lieu* of that, to enforce cl. 11B of the void SPA for the defendant to pay the plaintiff an agreed RM3.2 million as liquidated damages.

[54] As stated earlier in this judgment, a void contract or agreement cannot be enforced by law. When a contract or agreement is void, the whole terms in the contract are void and cannot be enforced. No term of the said contract can be spared. By making the above order for damages, the Court of Appeal clearly was enforcing the void SPA. There is no legal basis for that order. It is perfectly settled, that where the contract which the plaintiff seeks to enforce, is expressly or by implication forbidden by the common law or statute (as in the present case) no court will lend its assistance to give effect, more so where both parties to the contract (as in the present case) were consciously and willingly agreed to the contravention of the law by not complying with the requirement of s. 132C. Both parties were equally at fault (*potior est conditio defendantis*). (see: *Hughes and others v. Asset Managers* [1995] 3 All ER 669; *Cape v. Rowland* [1836] 2 M&W 149l, 150 ER 707; and *Holman v. Johnson* [1775] 98 ER 1120).

[55] Section 66 of the Contracts Act 1950 is clear on this point, that when a contract becomes void (as in the present case) the party who has received any advantage under the contract or agreement is bound to restore it to the person to whom he received it. The advantage to be restored under the section refers to the advantage that he had actually received from the other person. If the advantage received was in the form of 10% deposit of RM1.6 million, that same advantage must be restored or refunded to the plaintiff. If that cannot be done for whatever reason, then the defendant is bound to make compensation for it - either one, not both. In this regard illustration (d) to s. 66 is instructive:

> (d) A contracts to sing for B at a concert for RM1,000, which are paid in advance. A is too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if a had been able to sing, but must refund to B the RM1,000 paid in advance.

[56] The above illustration reflects the clear principle of contract law that consequential damages can only be claimed when there is in existence a valid and enforceable contract between the parties; and one of the parties have breached any one of the fundamental terms of the contract, as a result of which the claimant suffers loss or damage. In a case where the contract is void there is no enforceable term and therefore the question of breach of the contract to support claim for consequential damages does not arise.

[57] The question relating to "vacant possession" as stipulated in the SPA was also raised in the appeal before us. However, learned counsel for the defendant submitted that it was unnecessary to deal with this question if the Court of Appeal was wrong on the issue concerning contravention of s. 132C particularly where the plaintiff was not an innocent third party within the meaning of s. 132C(3) of the Companies Act 1965. No submission was canvassed before us by the defendant's solicitors on this ground. In effect, learned counsel for the defendant only relied on the question concerning non-compliance of s. 132C of the Companies Act 1965, in support its appeal before us.

[58] We are in agreement with the learned counsel for the defendant on this point. As we have stated earlier, non-compliance or contravention of the mandatory statutory requirement under s. 132C of the Companies Act 1965 rendered the SPA to be void and not enforceable by law. Therefore the question on "vacant possession" is no longer relevant. To deal with it would means we are dealing with the terms of a void agreement or contract which ultimately cannot be enforced by law.

Conclusion

[59] Based on the above considerations, we would answer the questions posed to us in the following manner:

(a) the mandatory statutory provisions under s. 132C of the Companies Act 1965 must be complied with and cannot be waived by agreement of the parties;

(b) non-compliance or contravention of the requirement renders the contract as void and invalid; and thus cannot be enforceable by law;

(c) being a void contract, by virtue of s. 66 of the Contracts Act 1950, the court of law may order restoration of whatever consideration or advantage paid or given under that contract; and

(d) being a void contract, a court of law cannot order damages for breach of any terms of the contract in favour of one of the contracting parties.

[60] In the upshot, we allow the appeal in part, in that the order of the Court of Appeal relating to the issue of damages to be assessed together with its interest or *in lieu* of assessment, the sum of RM3.2 million as agreed liquidated damages (which was stipulated in cl. 11B of the SPA) to be paid by the defendant to the plaintiff, is set aside. We however dismiss the appeal against the order of the Court of Appeal relating to the refund of the 10% deposit of RM1.6 million to the plaintiff. That order is therefore upheld with a variation that the interest of eight (8%) percent per annum payable on the refund is to be calculated from 22 January 2002 (being the date of filing of the writ) to the date of full settlement. We now invite the parties to address us on costs.

A

TAN CHEE HOE & SONS SDN BHD

v.

CODE FOCUS SDN BHD

B

FEDERAL COURT, PUTRAJAYA
RAUS SHARIF PCA
ABDULL HAMID EMBONG FCJ
AHMAD MAAROP FCJ
ABU SAMAH NORDIN FCJ
C RAMLY ALI FCJ
[CIVIL APPEAL NO: 02(f)-32-06-2013(W)
4 MARCH 2014

D ***CONTRACT:*** *Waiver - Conditions precedent - Sale and Purchase agreement - Sale of shares and substantial assets of company - Shareholders' approval for sale - Whether waived by parties - Whether offending s. 132C Companies Act 1965 - Mandatory statutory requirements - Whether could not be waived by contracting parties - Whether waiver void - Whether agreement invalidated - Claims based on*
E *terms of agreement - Whether unsustainable - Contracts Act 1950, s. 24 - Companies Act 1965, s. 132C & 132C(3)*

F ***CONTRACT:*** *Void contract - Formation - Effect - Sale and purchase agreement - Sale of shares and substantial assets of company - Shareholders' approval for sale waived by parties - Whether contravening s. 132 Companies Act 1965 - Whether parties had 'actual notice' of contravention - Whether not entitled to exception to 'void' rule - Whether contract void and not voidable - Benefits paid and received under contract - Whether to be restored - Contracts Act 1950, s. 66 - Companies Act*
G *1965, s. 132C & 132C(3)*

H ***CIVIL PROCEDURE:*** *Damages - Contract, breach of - Sale and purchase agreement - Contract performed in manner prohibited by statute - Whether void and unenforceable - Breach of terms thereof - Whether not amenable to order for damages - Defendant ordered to pay damages to be assessed or in lieu of assessment agreed liquidated damages as per void agreement - Whether devoid of legal basis*

I ***CIVIL PROCEDURE:*** *Interest - Interest payable on refund - Interest payable on refund of money paid under void contract - Calculation - Effective date for calculation of interest - Whether to take effect from date action was commenced at first instance - Whether inappropriate to award interest from date before institution of action*

The defendant (appellant) is the owner of the entire shares in Choo Hoe Sdn Bhd (CHSB) whose only asset is a piece of land in the township of Kuala Lumpur. By an agreement dated 10 November 1995 ('SPA'), the defendant agreed to sell the whole of its shareholding in CHSB to the plaintiff for a consideration of RM16 million. The plaintiff paid a 10% deposit of RM1.6 million and undertook to pay the balance sum by the completion date, 9 February 1996. The facts showed that the SPA made the completion date subject to two conditions, *viz*. the respective approvals of the Foreign Investment Committee and the defendant's shareholders for the intended sale ('conditions precedent'). However, by a document executed by the plaintiff simultaneously with the SPA ('side letter'), the plaintiff waived the defendant's obligations *vis-à-vis* the conditions precedent. The plaintiff executed the side letter notwithstanding that one of the conditions precedent, namely approval of the defendant's shareholders at an EGM, was mandated by s. 132C of the Companies Act 1965 ('Companies Act'). Misunderstandings arose between the parties as to their respective obligations under the SPA, and by the completion date, neither the balance sum nor vacant possession had been exchanged between the plaintiff and the defendant. Subsequently, the defendant terminated the SPA and forfeited the deposit. Arising therefrom, on 22 January 2002, the plaintiff filed an action in the Kuala Lumpur High Court claiming for the refund of the deposit, *albeit* unsuccessfully. It was the view of the High Court Judge, in dismissing the claim, that the waiver in the side letter was valid and enforceable, and that the defendant's non-performance of the conditions precedent did not cause the SPA to be void. According to the learned judge further, delivery of vacant possession was only a warranty and that the defendant's failure to deliver vacant possession on the completion date did not therefore amount to a breach of condition of the SPA. On appeal, the Court of Appeal however reversed the High Court's finding, opining that the mandatory statutory requirements under s. 132C of the Companies Act could not be waived, that the side letter was ineffective and void, that the SPA was not void but only voidable at the plaintiff's option, and that the defendant had breached the SPA. The Court of Appeal, in the event, ordered for the refund of RM1.6 million deposit and for damages to be assessed with interest at 8% p.a. calculated from 10 February 1996 (the completion date) to the date of full settlement, or, *in lieu* of assessment, for the defendant to pay the plaintiff the sum of RM3.2 million as agreed liquidated damages as per cl. 11B of the SPA.

Before the Federal Court, leave to appeal was granted essentially on the following questions of law, namely: (i) whether, in view of s. 66 of the Contracts Act 1950 ('Contracts Act'), the Court of Appeal could make the order for damages to be assessed in favour of the plaintiff or *in lieu* thereof, to enforce cl. 11B of the void SPA; and (ii) whether 'vacant possession' in a property transaction means freedom from physical impediment which substantially interferes with the enjoyment of a substantial part of the property. Evidently too, in its quest to challenge the restitution order of the Court of Appeal, the defendant, *inter alia,* relied on the authorities of the Federal Court and the Privy Council respectively in *Rimba Muda Timber Trading v. Lim Kuoh Wee ('Rimba Muda')* and *Sajan Singh v. Sardara Ali ('Sajan Singh')*.

Held (allowing appeal partly; setting aside order for damages to be assessed together with interest or *in lieu* thereof for payment of RM3.2 million as agreed liquidated damages; affirming order to refund 10% deposit to plaintiff with variation that interest be made payable from 22 January 2002 to date of full settlement)

Per Ramly Ali FCJ delivering the judgment of the court:

(1) The effect of the old and new subs. 3 of s. 132C of the Companies Act on the status of a third party dealing with the company is still the same, *ie*, it loses the benefit of the statutory rule in s. 132C(1) if it had 'actual notice' of the contravention or non-compliance of the requirement. In other words, if a third party such as the plaintiff had 'actual notice' of the non-compliance of s. 132C(1), then it cannot rely on the exception under s. 132C(3) to enforce the transaction or agreement in question. Such transaction or agreement is void and invalid (not voidable) as against the whole world including the third party. (para 24)

(2) The side letter was signed with the plaintiff's approval and authority and was validly executed. The effect of the finding of the learned judge on this issue is clear, in that the plaintiff had actual notice of the non-compliance or contravention of the mandatory statutory requirement under s. 132C of the Companies Act at the time the SPA was executed on 10 November 1995. The side letter showed that the plaintiff had agreed to consciously waive the provision of s. 132C. The side letter therefore had invalidated the SPA. Such waiver

clearly contravenes the mandatory requirement under s. 132C and, pursuant to s. 24 of the Contracts Act, is invalid in law. (paras 30, 31, 32, 35)

(3) The SPA was not merely voidable at the option of the plaintiff as found by the Court of Appeal, but invalid and void. Consequently, the plaintiff cannot make any claim based on the terms of such void agreement. The SPA, although lawful on its face according to its own terms, was unlawful as it was performed in a manner which the law or statute prohibits. The plaintiff had knowingly participated in the contravention of the statutory requirement under s. 132C of the Companies Act and was therefore not entitled to the protection under the exception in subs. 3 of the section. (paras 35 & 36)

(4) The plaintiff was trying to enforce a void contract. The SPA became void when the mandatory statutory requirement of shareholders' approval was not obtained and was consciously waived by the parties at the time it was executed. Therefore, s. 66 of the Contracts Act came into play, *ie*, that the defendant who had received an advantage (10% deposit of RM1.6 million) under the void contract is bound to restore it to the plaintiff from whom he received it. (paras 40, 41 & 55)

(5) While we agree with the Court of Appeal on the refund of the 10% deposit of RM1.6 million to the plaintiff, we cannot agree on the award of interest thereon "at the rate of 8% per annum calculated from 10 February 1996 to the date of full settlement". The SPA was void from the day of its execution when both parties knowingly and consciously agreed for the waiver in the side letter. The 10% deposit was paid by the plaintiff with such background and it is therefore unconscionable for the plaintiff to be allowed interest from 10 February 1996 (the day after completion date). If at all interest is to be awarded on the 10% deposit, it should start from the date when the action was first filed by the plaintiff in the High Court. We would hence order for interest on the refunded deposit to be fixed at the rate of 8% p.a. calculated from 22 January 2002 until date of full settlement. (paras 43 - 46)

(6) *Rimba Muda* and *Sajan Singh* can be distinguished as both were dealing with situations where the disputed contracts, though found to be illegal, were fully executed and fully carried out by the parties. The situation in the present case is

different as: (i) the SPA was not completed by the completion date; (ii) a mandatory precondition statutory requirement under s. 132C of the Companies Act had not been obtained or fulfilled; (iii) the parties have not fully discharged their obligations under the SPA; and (iv) the subject matter of the sale, namely the transfer of the shares from the defendant to the plaintiff, had not yet been effected. (paras 48 - 50).

(7) By making the order for damages, the Court of Appeal was clearly enforcing the void SPA. There is no legal basis for that order. It is perfectly settled that where the contract which the plaintiff seeks to enforce is expressly or by implication forbidden by common law or statute, as in the present case, no court of law will lend its assistance and give effect to the same, more so when both parties to the contract, as here, had consciously and willingly agreed to the contravention of the law by not complying with the requirement of s. 132C. (para 54)

(8) Non-compliance or contravention of the mandatory statutory requirement under s. 132C of the Companies Act rendered the SPA void and not enforceable by law. The question of "vacant possession" therefore is no longer relevant. In the circumstances, we would answer the questions posed as follows: *viz*. that (a) the mandatory statutory provisions under s. 132C must be complied with and cannot be waived by agreement of the parties; (b) non-compliance or contravention of the requirement renders the contract void and invalid and not enforceable by law; (c) by virtue of s. 66 of the Contracts Act, the court of law may order restoration of whatever consideration or advantage paid or given under the contract; and (d) being a void contract, the court cannot order damages for breach of any term of the contract in favour of one of the contracting parties. (paras 58 & 59)

Bahasa Malaysia *Translation Of Headnotes*

Defendan (perayu) adalah pemilik kesemua saham-saham di dalam Choo Hoe Sdn Bhd (CHSB) yang memiliki hanya sebidang tanah di dalam bandar Kuala Lumpur sebagai asetnya. Melalui perjanjian bertarikh 10 November 1995 ('SPA'), defendan beraku untuk menjual keseluruhan pegangan sahamnya di dalam CHSB kepada plaintif untuk balasan RM16 juta. Plaintif membayar 10% deposit berjumlah RM1.6 juta dan berjanji untuk membayar baki harga pada atau sebelum tarikh penyempurnaan, 9 Februari 1996. Fakta

menunjukkan SPA menjadikan tarikh penyempurnaan sebagai tertakluk kepada dua syarat, iaitu kelulusan oleh Jawatankuasa Pelaburan Asing dan pemegang-pemegang saham defendan akan penjualan tersebut ('syarat duluan'). Bagaimanapun, melalui dokumen yang dimeterai plaintif bersekali dengan SPA ('surat sampingan'), plaintif telah melepaskan defendan dari tanggungjawabnya berkaitan dengan syarat duluan. Plaintif memeterai surat sampingan walaupun salah satu dari syarat di situ, iaitu kelulusan pemegang-pemegang saham defendan di Mesyuarat Agong Luarbiasa, adalah diwajibkan oleh s. 132C Akta Syarikat 1965 ('Akta Syarikat'). Salah faham berbangkit di antara pihak-pihak berhubung pelaksanaan tanggungjawab mereka masing-masing, berakibat, sehingga berakhirnya tarikh penyempurnaan, tiada bayaran baki ataupun penyerahan milikan kosong berlaku di antara plaintif dan defendan. Berikutnya, defendan menamatkan SPA dan merampas deposit. Pada 22 Januari 2002, plaintif telah memfail tindakan di Mahkamah Tinggi Kuala Lumpur menuntut pengembalian deposit, namun tidak berjaya. Adalah pandangan yang arif hakim Mahkamah Tinggi, dalam menolak tuntutan, bahawa pelepasan di dalam surat sampingan adalah sah dan berkuatkuasa dan bahawa kegagalan melaksanakan syarat duluan tidak menyebabkan SPA menjadi tak sah. Menurut yang arif hakim lagi, penyerahan milikan kosong hanyalah suatu waranti, berakibat kegagalan defendan menyerahkan milikan kosong pada tarikh penyempurnaan bukanlah merupakan suatu pelanggaran syarat SPA. Di rayuan, Mahkamah Rayuan bagaimanapun mengakas keputusan Mahkamah Tinggi, sekaligus memutuskan bahawa keperluan wajib statutori di bawah s. 132C Akta Syarikat adalah tidak boleh diabaikan, bahawa surat sampingan adalah batal dan tidak berkesan, bahawa SPA bukan tak sah tetapi hanyalah boleh menjadi tak sah atas pilihan plaintif, dan bahawa defendan telah melanggari SPA. Berikutan itu, Mahkamah Rayuan memerintahkan supaya deposit RM1.6 juta dipulangkan kepada plaintif dan supaya gantirugi ditaksir berserta dengan faedah pada kadar 8% setahun dikira dari 10 Februari 1996 (iaitu tarikh penyempurnaan) sehingga tarikh penyelesaian, atau, sebagai ganti taksiran, supaya defendan membayar plaintif RM3.2 juta sebagai gantirugi jumlah tertentu yang dipersetujui selaras dengan peruntukan fasal 11B SPA.

Di hadapan Mahkamah Persekutuan, kebenaran merayu telah diberi atas persoalan undang-undang berikut, iaitu: (i) sama ada, mengambilkira peruntukan s. 66 Akta Kontrak 1950 ('Akta Kontrak'), Mahkamah Rayuan boleh membuat perintah supaya gantirugi

ditaksir untuk plaintif atau sebagai gantinya menguatkuasakan fasal 11B SPA; dan (ii) sama ada 'milikan kosong' dalam sesuatu transaksi hartanah bermakna kebebasan dari rintangan fizikal yang besar yang sekaligus mengganggu sebahagian besar dari kenikmatan hartanah. Juga jelas bahawa, dalam usahanya untuk mencabar perintah restitusi yang dibuat oleh Mahkamah Rayuan di atas, defendan, antara lain, bergantung kepada autoriti-autoriti Mahkamah Persekutuan dan Majlis Privi masing-masing di dalam *Rimba Muda Timber Trading v. Lim Kuoh Wee ('Rimba Muda')* dan *Sajan Singh v. Sardara Ali ('Sajan Singh')*.

Diputuskan (membenarkan rayuan sebahagiannya; mengenepikan perintah berkaitan taksiran gantirugi berserta dengan faedah atau sebagai gantinya pembayaran RM3.2 juta sebagai gantirugi jumlah tertentu yang dipersetujui; mengesahkan perintah pemulangan 10% deposit kepada plaintif dengan pindaan bahawa faedah hendaklah dikira dari 22 Januari 2002 hingga ke tarikh penyelesaian)

Oleh Ramly Ali HMP menyampaikan penghakiman mahkamah:

(1) Kesan sub-seksyen 3 s. 132C Akta Syarikat yang lama dan baru ke atas status seorang pihak ketiga yang berurusan dengan sebuah syarikat adalah masih sama, iaitu ia akan kehilangan manfaat kaedah statutori s. 132C(1) jika ia mempunyai 'notis sebenar' mengenai pelanggaran atau ketidakpatuhan terhadap kehendak seksyen tersebut. Dengan kata lain, jika seorang pihak ketiga seperti plaintif mempunyai 'notis sebenar' berkaitan ketidakpatuhan terhadap s. 132C(1), maka ia tidak boleh bergantung kepada pengecualian di bawah s. 132C(3) untuk menguatkuasa transaksi atau perjanjian tersebut. Transaksi atau perjanjian sedemikian adalah tak sah dan batal (bukan voidable) terhadap semua termasuk pihak ketiga.

(2) Surat sampingan ditandatangani dengan persetujuan dan autoriti plaintif dan dimeterai dengan sahnya. Kesan dari dapatan yang arif hakim terhadap isu ini adalah jelas, iaitu bahawa plaintif mempunyai notis sebenar mengenai ketidakpatuhan atau pelanggaran terhadap kehendak wajib statut di bawah s. 132C Akta Syarikat semasa SPA dimeterai pada 10 November 1995. Surat sampingan menunjukkan bahawa plaintif secara sedar bersetuju untuk mengabaikan peruntukan s. 132C. Surat sampingan dengan itu telah

menyebabkan SPA menjadi tak sah. Pengabaian sedemikian melanggari kehendak wajib statut di bawah s. 132C dan berdasarkan s. 24 Akta Kontrak, adalah tak sah di sisi undang-undang.

(3) SPA bukan sahaja voidable atas pilihan plaintif seperti yang didapati oleh Mahkamah Rayuan, tetapi adalah tak sah dan terbatal. Oleh itu, plaintif tidak boleh membuat sebarang tuntutan berdasarkan kepada terma-terma perjanjian yang batal tersebut. SPA, walaupun sah atas permukaan berdasarkan terma-termanya sendiri, menjadi tak sah kerana dilaksanakan secara yang dilarang oleh undang-undang atau statut. Plaintif telah secara sedar terlibat dalam pelanggaran kehendak statutori di bawah s. 132C Akta Syarikat dan kerana itu tidak berhak kepada perlindungan di bawah pengecualian subseksyen 3 seksyen tersebut.

(4) Plaintif telah cuba untuk menguatkuasakan satu kontrak yang batal. SPA menjadi batal apabila keperluan wajib statutori, iaitu kelulusan pemegang saham, tidak diperolehi dan diabaikan dengan secara sedar oleh pihak-pihak semasa ianya dimeterai. Oleh yang demikian, s. 66 Akta Kontrak menjadi terpakai, yakni, bahawa defendan yang menerima suatu manfaat (10% deposit berjumlah RM1.6 juta) di bawah kontrak yang batal wajib memulangkannya kepada plaintif dari siapa ia menerima manfaat tersebut.

(5) Sementara kami bersetuju dengan Mahkamah Rayuan bahawa 10% deposit berjumlah RM1.6 juta hendaklah dikembalikan kepada plaintif, kami tidak boleh bersetuju dengan award faedah ke atas deposit "pada kadar 8% setahun dikira dari 10 Februari 1996 hingga ke tarikh penyelesaian". SPA adalah tak sah sejak dari hari ianya dimeterai bilamana pihak-pihak dengan pengetahuan dan kesedaran bersetuju kepada pengabaian melalui surat sampingan. Jumlah deposit 10% dibayar oleh plaintif kepada defendan berlandaskan latarbelakang ini dan dengan itu, ianya adalah tidak berhati budi untuk memberikan plaintif faedah dari tarikh 10 Februari 1996 (iaitu sehari selepas tarikh penyempurnaan). Jikapun faedah hendak diberikan ke atas deposit 10%, ia harus bermula dari tarikh bilamana tindakan difailkan oleh plaintif di Mahkamah Tinggi menuntut pengembalian deposit. Oleh itu, kami memerintahkan supaya faedah ke atas deposit RM1.6 juta yang dikembalikan ditetapkan pada kadar 8% setahun dikira dari 22 Januari 2002 hingga ke tarikh penyelesaian.

(6) *Rimba Muda* dan *Sajan Singh* boleh dibezakan kerana kedua-duanya berurusan dengan situasi di mana kontrak atau perjanjian yang dipertikai, walaupun didapati tak sah, telah dilaksanakan sepenuhnya oleh pihak-pihak terlibat. Keadaan dalam kes di sini adalah berbeza kerana: (i) SPA tidak disempurnakan pada tarikh penyempurnaan; (ii) satu syarat duluan wajib statutori yang diperlukan oleh s. 132C Akta Syarikat telah tidak diperolehi atau dipenuhi; (iii) pihak-pihak masih belum menunaikan sepenuhnya obligasi-obligasi mereka di bawah SPA; dan (iv) halperkara penjualan, yakni pemindahan saham-saham dari defendan kepada plaintif, masih lagi belum dibuat.

(7) Dengan membuat perintah untuk gantirugi, Mahkamah Rayuan dengan jelas telah menguatkuasakan SPA yang tak sah. Ianya sesuatu yang mantap bahawa di mana kontrak yang hendak dikuatkuasa oleh plaintif telah dilarang oleh undang-undang common atau statut sama ada secara ekpres atau tersirat, seperti yang berlaku di sini, maka tiada mahkamah undang-undang yang akan membantu memberi kesan kepadanya, lebih-lebih lagi bilamana kedua-dua pihak yang berkontrak, seperti halnya di sini, telah dengan sengaja dan relahati bersetuju dengan pelanggaran undang-undang dengan cara tidak mematuhi kehendak s. 132C.

(8) Ketidakpatuhan atau pelanggaran keperluan wajib statutori di bawah s. 132C Akta Syarikat menjadikan SPA tak sah dan tidak boleh dikuatkuasakan di sisi undang-undang. Oleh itu, persoalan "milikan kosong" sudah tidak lagi relevan. Dengan yang demikian, kami akan menjawab soalan-soalan yang dikemukakan seperti berikut, iaitu bahawa: (a) peruntukan wajib statutori di bawah s. 132C mesti dipatuhi dan tidak boleh diabaikan melalui perjanjian antara pihak-pihak; (b) ketidakpatuhan atau pelanggaran peruntukan ini akan menyebabkan kontrak menjadi tak sah dan batal dan tidak boleh dikuatkuasakan di sisi undang-undang; (c) bersandarkan kepada s. 66 Akta Kontrak, mahkamah undang-undang boleh memerintahkan pengembalian apa jua balasan atau manfaat yang diberi atau dibayar di bawah kontrak; dan (d) memandangkan kontrak adalah tak sah, mahkamah tidak boleh memerintahkan gantirugi atas pelanggaran mana-mana terma kontrak kepada salah satu pihak-pihak yang berkontrak.

Case(s) referred to:
Ahmad Udoh & Anor v. Ng Aik Chong [1969] 1 LNS 4 HC ***(refd)***
Chase Perdana Bhd v. Md Afendi Hamdan [2009] 6 CLJ 501 FC ***(refd)***
Cope v. Rowlands [1836] 2 M & W 149 ***(refd)***
Harnath Kaur v. Inder Singh [1922] LR 50 1A 69 ***(refd)***
Holman v. Johnson [1775] 98 ER 1120 ***(refd)***
Hughes and others v. Asset Managers [1995] 3 All ER 669 ***(refd)***
K/S Lincoln v. CB Richard Ellis Hotels Ltd [2009] EWHC 2344 ***(refd)***
Menaka v. Lum Kum Chum [1976] 1 LNS 181 PC ***(refd)***
National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 FC ***(refd)***
Rimba Muda Timber Trading v. Lim Kuoh Wee [2006] 3 CLJ 93 FC ***(dist)***
Sajan Singh v. Sardara Ali [1959] 1 LNS 90 PC ***(dist)***
Yango Pastoral Co Pty Ltd v. First Chicago Australia Ltd [1978] 139 CLR 410 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 132C(1), (3)
Companies (Amendment) Act 2007, s. 132C(1)(b), (3), (5)
Contracts Act 1950, ss. 2(g), 24, 54, 55, 66
Moneylenders Ordinance 1951, s. 8

Indian Contract Act 1872 (Ind), s. 65

For the appellant/defendant - Loh Siew Cheang (Yap Mong Jay with him); M/s Cheang & Ariff
For the respondent/plaintiff - Gopal Sri Ram (Harpal Singh Grewal, Amrit Pal Singh & Reny Rao with him); M/s Al Nathan

[Editor's note: For the Court of Appeal judgment, please see Code Focus Sdn Bhd v. Tan Chee Hoe & Sons Sdn Bhd [2013] 4 CLJ 1053.]

Reported by Wan Sharif Ahmad

JUDGMENT

Ramly Ali FCJ:

[1] The appellant, Tan Chee Hoe & Sons Sdn Bhd, was the defendant in the High Court, and the respondent, Code Focus Sdn Bhd, was the plaintiff there. For the purpose of this judgment, the appellant will be referred to as the defendant and the respondent as the plaintiff, as they were referred to at the High Court.

[2] The present appeal before us is by the defendant against the unanimous decision of the Court of Appeal on 14 August 2012 in allowing the plaintiff's appeal against the decision of the High Court, and ordering the defendant to refund the plaintiff's deposit of RM1.6 million and damages to be assessed or alternatively the defendant to pay the plaintiff damages in the sum of RM3.2 million as agreed liquidated damages stipulated in the sale and purchase agreement ('SPA') dated 10 November 1995 between the parties.

[3] On 23 May 2013, leave to appeal was granted by this court to the defendant on the following questions of law, namely:

(i) where the Court of Appeal makes a decision on a subject matter affecting the rights and liabilities of litigants based on a non-existing statutory provision, whether or not the Federal Court should, as a matter of course, review that decision as a whole on appeal proper by granting leave to appeal?;

(ii) where contracting parties waive a mandatory statutory provision prior to the entering of a contract, whether a court of law may order restoration of consideration paid under that contract and further order damages for breach of contract in favour of one of the contracting parties notwithstanding s. 66 of the Contracts Act 1950?; and

(iii) where in law the expression 'vacant possession' concerning property transactions means freedom from physical impediment which substantially interferes with the enjoyment of substantial part of a property or any physical impediment however slight and affecting any part of the property however insubstantial?.

Factual Background

[4] The defendant (as vendor) had entered into an agreement dated 10 November 1995 with the plaintiff (as purchaser) for the purchase of the total issued and paid-up shares of Choo Hoe Sdn Bhd ('CHSB') which comprised of 931,002 ordinary shares for a purchase price of RM16 million (the SPA). The plaintiff had agreed to purchase the said shares because it was interested in a piece of land owned by CHSB. The land in question was to a piece of freehold land measuring 1a or 24.5 poles (50,230 sq. ft.) held under certificate of title No. 12920 Lot 92, Section 46 in the Town of Kuala Lumpur along Jalan Putra (the said land). The said land was the only asset/property of CHSB.

[5] Pursuant to the SPA the plaintiff paid the defendant 10% deposit of RM1.6 million. The balance 90% of the purchase price was to be paid on or before 9 February 1996 (the completion date). Other salient terms of the SPA are as follows:

(a) the balance purchase price was to be paid to the defendant on or before the completion date (cl. 2.2(c));

(b) the completion of the SPA was subject to two conditions precedent, namely: (i) approval of the foreign investment committee ('the FIC') within 75 days from the date of the SPA; and (ii) approval of the defendant's shareholders in an extraordinary general meeting ('EGM') approving the sale of the shares to the plaintiff (cl. 3.5);

(c) the defendant was to evict all squatters at its own costs and deliver vacant possession of the said land judgment of the court: in question to the plaintiff by the completion date (Recital I and cl. 8.1(21)(d));

(d) the defendant was to refund the deposit in the event the FIC approval was not obtained (cl. 3.4);

(e) in the event the plaintiff failed to pay the balance of the purchase price on or before the completion date, the SPA shall automatically terminate and the defendant shall be entitled to forfeit the deposit (cl. 11A); and

(f) time shall be the essence of the SPA (cl. 12.11).

[6] It is not in dispute that there were several encroachments on the said land. The plaintiff averred that in breach of cl. 8.1 of the SPA, the defendant had failed to remove the encroachments or prepare for delivery of vacant possession of the said land on or before the completion date to the plaintiff.

[7] The balance of the purchase price was not paid by the plaintiff to the defendant by the completion date. Consequently the defendant treated the SPA as having been terminated by virtue of cl. 11A of the SPA, and in accordance with the terms of the SPA, the 10% deposit of RM1.6 million already paid by the plaintiff was forfeited by the defendant.

[8] The plaintiff disputed the forfeiture of the deposit. It claimed that the defendant was in breach of its obligations under the SPA, as it had failed to deliver vacant possession of the said land in question to the plaintiff by the completion date and therefore the plaintiff's obligation to pay the balance of the purchase price did not arise.

[9] The plaintiff also claimed that the defendant had failed, refused and/or neglected to fulfill the conditions precedent ie, to get the approval of the FIC within 75 days from the date of the SPA; and the approval of the defendant's shareholders in an EGM approving the sale of the shares to the plaintiff.

[10] The defendant on the other hand claimed that all the encroachments on to the said land had been removed by the completion date and it was ready to deliver vacant possession on that date. In any event, the defendant contended that the obligation to deliver vacant possession of the said land was only a warranty.

[11] As for the two conditions precedent, the defendant contended that such obligation to perform them had been waived by a side letter dated 10 November 1995 issued by the plaintiff to the defendant.

The Plaintiff's Suit: At The High Court

[12] The plaintiff commenced the present suit in the Kuala Lumpur High Court on 22 January 2002. After a full trial, the learned High Court Judge dismissed the plaintiff's claim with costs. In her judgment, the learned High Court Judge made the following findings, namely:

(a) that on the balance of probabilities, the side letter dated 10 November 1995 (the same date when the SPA was executed) was in fact signed with the authority or approval of the plaintiff and therefore the waiver was valid and effective where the parties had in fact agreed to waive the performance of the conditions precedent and that there was no legal impediment to such waiver; and the nonperformance of the conditions precedent did not cause the SPA to be void;

(b) that on the issue of vacant possession, the defendant was able to deliver vacant possession of the said land to the plaintiff on the completion date; and in any event, the failure to deliver

vacant possession of the said land on the completion date did not amount to a breach of condition of the SPA; it was only a breach of warranty; and

(c) that, in the circumstances of the case, upon the failure of the plaintiff to pay the balance of the purchase price as required by cl. 2.2(c), the provisions of cl. 11A kicked in and the SPA became automatically determined and the deposit became absolutely forfeited to the defendant. There was therefore no issue of any act of termination or forfeiture by the defendant; and the forfeiture of the deposit was therefore lawful and in accordance with the terms of the SPA.

At The Court Of Appeal

[13] The Court of Appeal, after hearing submissions from both sides, unanimously reversed the decision of the High Court. In doing so, the Court of Appeal *inter alia* made the following findings, namely:

(a) that the side letter dated 10 November 1995 (exh. P5) was void by virtue of s. 132C of the Companies Act 1965 and the mandatory statutory requirement of the section could not be waived by agreement of the parties; therefore cls. 3.1 to 3.6 of the SPA (which were allegedly waived by the side letter) were thus operative and the conditions precedent had to be complied with; bereft of the compliance, the SPA became voidable at the option of the plaintiff and the plaintiff was entitled to the refund of the deposit and to obtain damages;

(b) reading the terms of the SPA, the plaintiff need not pay the balance of the purchase price by the completion date because on that date, the defendant could not deliver vacant possession of the said land to the plaintiff in breach of cl. 8.1 of the SPA; and

(c) that it was unconscionable to allow the defendant to retain the deposit on the ground that there was a fundamental breach by the defendant in not delivering vacant possession of the said land by the completion date which went to the root of the agreement coupled with the voidability of the SPA at the instance of the plaintiff.

[14] For the various reasons as highlighted in the judgment, the Court of Appeal unanimously allowed the plaintiff's appeal with costs of RM50,000, and made an order for the deposit of RM1.6

million together with interest at the rate of (8%) per annum calculated from 10 February 1996 to the date of full settlement or *in lieu* of assessment, the sum RM3.2 million as agreed liquidated damages, which was stipulated in cl. 11B of the SPA to be paid by the defendant to the plaintiff.

At The Federal Court

[15] Before us, the defendant raised two issues, namely:

(a) where contracting parties waive a mandatory statutory requirement to the entering of a contract, whether a court of law may order refund or return of consideration paid under that contract and further order damages for breach of contract in favour of one of the contracting parties notwithstanding s. 66 of the Contracts Act 1950?

(b) whether in law the expression 'vacant possession' concerning property transaction means freedom from physical impediment which substantially interferes with the enjoyment of substantial part of the property or any physical impediment however slight and affecting any part of the property however insubstantial?

[16] Learned counsel for the defendant, submitted at the outset that the statutory principles contained in s. 132C of the Companies Act 1965 would determine the appeal before the court; and the legal principles explained by the Federal Court in *Rimba Muda Timber Trading v. Lim Kuoh Wee* [2006] 3 CLJ 93; [2006] 4 MLJ 505 as well as ss. 2(g), 24 and 66 of the Contracts Act 1950, will determine the propriety of the orders on recovery of deposit and substantial damages, made by the Court of Appeal in the plaintiff's favour.

[17] To strengthen its argument, learned counsel for the defendant relied on the following contentions, namely:

(a) the Court of Appeal erred in law in finding that in the absence of shareholders' approval for the disposal of substantial assets of a company, the underlying transaction or contract is only 'voidable' under s. 132C; and in law, the provisions of s. 132C(3) expressly specified that in consequence of its non-compliance the contract is 'void', simply upon the fact of absence of shareholders' approval as required under s. 132C(1);

(b) the Court of Appeal erred in law in not giving effect to the statutory requirement under s. 132C(3) whether the plaintiff had 'actual notice' of the contravention of s. 132C or had consciously contravened the same, a necessary issue for the purpose of ascertaining the availability of the exception to the plaintiff provided for in s. 132C(3) and right to restitution and damages; and

(c) the Court of Appeal erred in law in assisting the plaintiff, a willing and knowing participant to a breach of s. 132C, by ordering restitution and payment of substantial damages or *in lieu* thereof, liquidated damages in its favour, contrary to the common law, s. 24 and s. 66 of the Contracts Act 1950.

[18] In his submissions, learned counsel for the plaintiff agreed that the requirement to obtain shareholders' approval was a mandatory statutory requirement under s. 132C(1) of the Companies Act 1965 and must be complied with even if not contractually provided for. The plaintiff further submitted that "it is undisputed that the need to obtain the defendant's shareholders' approval for the sale of the shares was a condition precedent to the SPA; it is a well-established principle of law that if a condition precedent is not fulfilled and/or satisfied, then there is no valid contract". However, the plaintiff contended that the Court of Appeal was correct in giving effect to ss. 54 and 55 of the Contracts Act 1950 which provide that the party that prevents the other party from performing its promise is liable to compensate the other party for any loss which it may sustain.

[19] In supporting the Court of Appeal's decision, the plaintiff argued that the defendant had breached two fundamental terms of the SPA ie, failure to obtain shareholders' approval and failed to deliver vacant possession of the said land to the plaintiff. On that premise, the plaintiff claimed that the defendant had no right to forfeit the plaintiff's 10% deposit of RM1.6 million and the plaintiff is entitled to the agreed liquidated damages as provided for in the SPA.

Section 132C Of The Companies Act 1965

[20] We shall now deal with the provisions of s. 132C of the Companies Act 1965; its intended purpose, scope, and the effect of its non-compliance. The current s. 132C provides:

A

132C. Approval of company required for disposal by directors of company's undertaking or property

(1) Notwithstanding anything in the memorandum or articles of association of the company, the directors shall not carry into effect any arrangement or transaction for:

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(a) the acquisition of an undertaking or property of a substantial value; or

(b) the disposal of a substantial portion of the company's undertaking or property, unless the arrangement or transaction has been approved by the company in a general meeting.

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(1A) For the purpose of subsection (1), in the case of a company where all or any of its shares are listed for quotation on the official list of a Stock Exchange as defined in the Securities Industry Act 1983, the term 'substantial value' or 'substantial portion' shall mean the same value prescribed by the provisions in the listing requirements of the Exchange:

D

(a) which relates to acquisitions or disposals by a company or its subsidiaries to which such provision applies; and

E

(b) which would require the approval of shareholders at a general meeting in accordance with the provisions of such listing requirements.

F

(1B) In the case of any company other than a company to which subsection (1A) is applicable, an undertaking or property shall be considered to be of a substantial value and a portion of the company's undertaking or property shall be considered to be a substantial portion if:

G

(a) its value exceeds twenty-five per centum of the total assets of the company;

(b) the net profits (after deducting all charges except taxation and excluding extraordinary items) attributed to it amounts to more than twenty-five per centum of the total net profit of the company; or

H

(c) its value exceeds twenty-five per centum of the issued share capital of the company, whichever is the highest.

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(2) The Court may, on the application of any member of the company, restrain the directors from entering into a transaction in contravention of subsection (1).

(3) Where an arrangement or transaction is carried into effect in contravention of subsection (1), the arrangement or transaction shall be void except in favour of any person dealing with the company for valuable consideration and without actual notice of the contravention.

(4) This section shall not apply to proposals for disposing of the whole or substantially the whole of the company's undertaking or property made by a receiver and manager of any part of the undertaking or property of the company appointed under a power contained in any instrument or by a Court or a liquidator of a company appointed in a voluntary winding up.

(5) Any director who contravenes the provision of this section shall be guilty of an offence against this Act. Penalty: Imprisonment for five years or thirty thousand ringgit or both.

(6) In this section, "director" includes the chief executive officer, the chief operating officer, the chief financial controller or any other person primarily responsible for the operation or financial management of a company, by whatever name called.

[21] The current s. 132C was inserted by the Companies (Amendment) Act 2007 (Act A1299/07) which came into effect on 15 August 2007. Under the provisions of the sub-s. (1)(b) directors cannot carry into effect any proposal or execute any transaction for the disposal of a substantial portion of the company's undertaking or property unless the arrangement or transaction has been approved by the company in a general meeting. The approval of the shareholders in a general meeting must first be obtained before the transaction or disposal is carried into effect. A transaction or disposal entered into in contravention of this subsection is invalid and void except in favour of any person dealing with the company for valuable consideration and without actual notice of the contravention. Any director of a company who contravenes this section shall be guilty of an offence and liable to imprisonment for five years or a RM30,000 fine or both. This statutory requirement is mandatory, notwithstanding anything in the company's memorandum or articles of association. If the directors decide to make a disposal of a substantial portion of the company's undertaking or property, a disclosure of the proposed transaction must be made to the shareholders to enable the shareholders to make an informed decision on the transaction in a general meeting.

[22] Section 132C(1) statutorily emplaces that *intra vires* power of disposal of company's substantial property and undertaking in the hand of the shareholders at the general meeting and declares transaction as 'invalid' and 'void' without such shareholders' approval. In actual fact, shareholders are 'owners' of a company. They raise capital for operational requirement of the company as a going concern, while directors, who may or may not be shareholders are only involved in the day to day management of the company.

[23] Under the present sub-s. (3), an arrangement or transaction carried into effect in contravention of sub-s. (1) "shall be void except in favour of any person dealing with the company for valuable consideration and without actual notice of the contravention." However, under the amended 1987 provisions, a transaction entered into in contravention of section (1) "shall, in favour of any person dealing with the company for valuable consideration, and without actual notice of the contravention, be as valid as if that subsection has been complied with." In effect the present sub-s. (3) changed the wordings of the exception from the positive approach to the negative approach. The present provisions were to make clear on issue of ambiguity that relates to the penalty in criminal liability on directors who fail to comply with the mandatory prohibition of sub-s. (1), as stipulated under sub-s. (5). In effect the new sub-s. (3) penalizes contravening directors regardless of whether a third party in dealing with the company for valuable consideration had actual notice or not of the contravention.

[24] However, the effect of both the provisions on the status of a third party dealing with the company is still the same ie, it loses the benefit of the statutory rule in s. 132C(1) if it had 'actual notice' of the contravention or noncompliance of the requirement. In other words if a third party (in this case the plaintiff) had 'actual notice' of the non-compliance of s. 132C(1), then it cannot rely on the exception under s. 132C(3) to enforce the transaction or agreement in question (in this case is the SPA dated 10 November 1995); and the transaction or agreement is void, and invalid (not voidable) as against the whole world as well as the third party (the plaintiff). (Under s. 2(g) of the Contracts Act 1950 a 'void' agreement cannot be enforceable by law; while 'voidable' agreement is only enforceable by law at the option of one or more of the parties, but not at the option of the other).

[25] In the present case, it is not in dispute that the transaction or agreement between the plaintiff and the defendant involved an agreement to dispose of a substantial portion of the defendant's asset or property ie, the total issued and paid up shares of CHSB for a purchase price of RM16 million, by the defendant (as vendor) to the plaintiff (as purchaser). It is also not in dispute that the mandatory requirement of shareholders' approval under s. 132C(1) of the Companies Act 1965 had not been obtained by the defendant, by the completion date.

[26] In order to determine the validity of the SPA, the issue which must be considered is whether the plaintiff (as the third party dealing with the defendant company) came under the exception to the 'void' rule under s. 132C(3). The pertinent question to ask is whether the plaintiff had 'actual notice' of the non-compliance. If it had 'actual notice' of the non-compliance of s. 132C, then, the exception does not apply and the result is clear – that the SPA is void and invalid; and cannot be enforced by the plaintiff. When an agreement is void or invalid the whole agreement is void; and the whole agreement cannot be enforceable by law (see: s. 2(g) of the Contract Act 1950).

[27] The defendant relied on the contents of the side letter dated 10 November 1995 issued by the plaintiff and addressed to the defendant. The side letter was issued contemporaneously ie, on the same date with the execution of the SPA. To better understand the effect of the side letter, we shall reproduce its contents in full:

CODE FOCUS SDN BHD
NO. 9 JALAN DORAISAMY, OFF JALAN DANG WANGI
50300 KUALA LUMPUR
TEL: 03-2985288 FAX: 03-2985028

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10 November 1995

TAN CHEE HOE & SONS SDN BHD
Nos. 6 & 8 Jalan Gereja [2nd Floor]
50100 Kuala Lumpur

Dear Sirs,

A Re: Sale Purchase Agreement dated 10 November 1995
Subject matter : Sale and Purchase of Shares of Choo Hoe Sdn Bhd
Vendor : Tan Chee Hoe & Sons Sdn Bhd
Purchaser : Code Focus Sdn Bhd

B _____

We refer to the above matter.

Pursuant to our discussions, we hereby agree that clauses 3.1, 3.2, 3.3, 3.4, 3.5 and 3.6 of the Sale and Purchase Agreement C shall no longer apply.

We enclosed herewith our banker's cheque MBB No. 012408 for RM1,440,000.00 favouring your Solicitors M/S P.G. Lim & Co. which together with the earlier payment of RM160,000.00 shall form the deposit payment of 10%. D

Yours faithfully,

CODE FOCUS SDN BHD

sgd	sgd
E ...	...
DIRECTOR	We, Tan Chee Hoe & Sons Sdn Bhd hereby agree to the
F	abovementioned terms and hereby acknowledge receipt of the banker's cheque

[28] The High Court, after hearing the witnesses and evaluating G the evidence given during trial, found that the side letter was signed with the plaintiff's approval and authority; and that it had been validly executed. The learned judge concluded that "the parties had in fact agreed to waive the performance of the conditions precedent by way of a valid side letter signed on H 10 November 1995, and that there was no legal impediment to such waiver ... the non-performance of the conditions precedent did not therefore cause the SPA to be void."

[29] The Court of Appeal reversed this finding and maintained I that mandatory statutory requirements under s. 132C of the Companies Act 1965 cannot be waived. The Court of Appeal

held that the side letter "is ineffective and void" and further held that the SPA was 'voidable' at the plaintiff's option. Accordingly, the Court of Appeal found that the defendant had breached the SPA and it must refund the 10% deposit of RM1.6 million and pay damages to be assessed, or *in lieu* thereof, the agreed liquidated damages of RM3.2 million as stipulated in the SPA, to the plaintiff.

[30] As found by the learned High Court Judge, the side letter was in fact signed with the plaintiff's approval and authority; and was validly executed. The learned judge was satisfied that the side letter was signed by one Mr Ng Chen Foo, a director of the plaintiff, who was present at the time when the SPA was to be signed. In short, the effect of the finding of the learned High Court Judge on this issue is clear that the plaintiff had actual notice of the noncompliance or contravention of the mandatory statutory requirement under s. 132C at the time when the SPA was executed on 10 November 1995. The side letter in effect shows that the plaintiff had agreed to consciously waive the provision of s. 132C. Therefore, we are of the view that the side letter invalidated the SPA. Such waiver clearly contravenes the mandatory requirement under s. 132C and invalid in law.

[31] The authorities on this matter are clear. Section 24 of the Contracts Act 1950 stipulates in effect that the consideration or object of an agreement is unlawful if it is forbidden by law or if it is such a nature that if permitted, would defeat any law. Every agreement of which the object or consideration is unlawful is void; and a void contract cannot be enforceable by law.

[32] His Lordship Parke B in *Cope v. Rowlands* [1836] 2 M & W 149 at p. 157; had stated:

> It is perfectly settled, that where the contract which the Plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common law or statute, no court will lend its assistance to give effect.

The above principle was adopted by Hirst LJ in *Hughes and others v. Asset Managers* [1995] 3 All ER 669.

[33] To knowingly and consciously waive the mandatory statutory requirement of s. 132C of the Companies Act 1965 is unlawful. The court of law will not entertain such unlawful act by allowing

A claim based on the void agreement. The same principle was adopted by Coulson J in *K/S Lincoln v. CB Richard Ellis Hotels Ltd* [2009] EWHC 2344 where it was held that "it seems clear that the underlying principle or policy is one of deterrence; that the courts will not encourage illegal acts by allowing claim based upon
B them."

[34] The Federal Court in *Chase Perdana Bhd v. Md Afendi Hamdan* [2009] 6 CLJ 501; [2009] 6 MLJ 783 had affirmed and adopted the same principle as follows:

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> The law on this is quite established. Once it is enacted by legislation that parties are required to comply with any provision, parties must comply with such provision. It is not for any person to waive legislative requirements by an agreement unless the legislation allows it to be done. Legislation enacts laws which in
> D its opinion are for the benefit of the public. It is not for the courts, or anybody for that matter, to say that it need not be followed.

[35] The interest of the shareholders of the defendant company, must be protected. That is the intention of s. 132C of the
E Companies Act 1965; particularly as in the present case there were a number of shareholders of the defendant company at the material time. The shareholders then were Tan Eng Teong, Tan Tack Lin, Tan Eng How, the Estate of Tan Chee Hoe and Tan Eng Sin (Tan Eng Teong, Tan Teck Lin and Datin Chan Woi
F Choo as trustees).

[36] Based on the above considerations, it is clear that the SPA in question was not merely voidable at the option of the plaintiff as found by the Court of Appeal but invalid and void. The
G plaintiff cannot make any claim based on the terms of the said void agreement. The SPA, although lawful on its face according to its own terms, was unlawful as it was to be performed in a manner which the law or statute prohibits. (see: *Yango Pastoral Co Pty Ltd v. First Chicago Australia Ltd* [1978] 139 CLR 410). The
H plaintiff had knowingly participated in the contravention of the statutory requirement under s. 132C; and therefore not entitled to the protection under the exception in sub-s. (3).

I

Section 66 Of The Contracts Act 1950

[37] The effect of a void contract or agreement is provided for under s. 66 of the Contracts Act 1950, which reads:

> 66. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

[38] The facts of the present case do fit the meaning of the words "discovered to be void" or "becomes void" as found in s. 66 above. The Privy Council in *Harnath Kaur v. Inder Singh* [1922] LR 50 1A 69 in considering a claim based on s. 65 of the Indian Contract Act 1872 (which was identical to our s. 66 of the Contracts Act 1950) ruled:

> an agreement, therefore, discovered to be void is one discovered to be not enforceable by law, and on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void.

The above principle was followed by Wan Suleiman J in *Ahmad Udoh & Anor v. Ng Aik Chong* [1969] 1 LNS 4; [1969] 2 MLJ 116.

[39] A right to restitution may arise out of a failure of a contract though the right itself be not a matter of contractual obligation. It appears to be based on the principle exemplified in the Roman Law '*condictio causa data causa non secuta*' (contract becoming impossible to perform owing to the outbreak of war in 1914). The Privy Council in *Menaka v. Lum Kum Chum* [1976] 1 LNS 181; [1977] 1 MLJ 91, in dealing with s. 65 of the Indian Contracts Act 1872 (which is identical to our s. 66 of the Contracts Act 1950) ruled:

> In that way effect will be given to section 65 under which each party is bound to restore any advantage which he has received to the person from whom he received it – see *Govindram Seksaria v Radbone* where Lord Morton of Henryton said:
>
> > The result of section 65 of the Indian Contract Act was that, as from [the date on which the contract became void] each of the parties became bound to restore to the other any advantage which the restoring party had received under the contract of sale.

[40] The plaintiff in the present case, expressly based its entire claim on the terms of the SPA. The plaintiff, *inter alia*, alleged that the defendant was in breach of the said SPA in failing to deliver vacant possession of the said land in question to the plaintiff; and to obtain shareholders' approval under s. 132C of the Companies Act 1965 on or before the completion date, as stipulated in various clauses of the SPA. At the same time, the plaintiff expressly in para. 12 of its statement of claim claimed that it was "at all material times ready, willing and able to honour its obligations under the SPA, subject to the SPA becoming unconditional ..." Clearly, the plaintiff in this case, was trying to enforce a void contract.

[41] The SPA in this case became void when the mandatory statutory requirement of shareholders' approval was not obtained and was consciously waived by the parties at the time when it was executed. Therefore, s. 66 of the Contracts Act 1950 came into play ie, that defendant who had received an advantage (in the form of the 10% deposit of RM1.6 million) under the void agreement or contract (the SPA) is bound to restore it to the plaintiff from whom he received it.

[42] The failure of an agreed or statutory condition precedent frees contracting parties from their further obligations. The contract become void. The decision of the Federal Court in *National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd* [1983] 2 CLJ 76; [1983] CLJ (Rep) 282; [1983] 2 MLJ 211 is enlightening on this issue. In that case, it was held that:

> whether it is held that the requirement as to approval is a contingent condition or as a mere promissory condition the result would not be different. In the first case there was no agreement to enforce until the requirement was satisfied and the deposit was returnable under the provision of the agreement itself as there was no ground for withholding it any longer; whereas in the second case although there was a subsisting contract it was however defeated or frustrated by a supervening event, which is non-fulfilment of the requirement and in this case also the deposit was refundable as money had and received for the use of the Appellants who had paid it.

[43] On this issue, we are in agreement with the Court of Appeal that the 10% deposit of RM1.6 million was to be refunded by the defendant to the plaintiff. However we cannot agree on the issue

of interest on the deposit "at the rate of (8%) per annum calculated from 10 February 1996 to the date of full settlement" as ordered by the Court of Appeal.

[44] In this case, the SPA was void right from the day of its execution (10 November 1995) when both parties knowingly and consciously agreed for the waiver in the side letter of the same date. The 10% deposit of RM1.6 million was willingly paid by the plaintiff to the defendant with that background. It is unconscionable for the plaintiff to be allowed interest from the date 10 February 1996 as fixed by the Court of Appeal. (apparently, the date 10 February 1996 was based on the completion date of the SPA – 9 February 1996).

[45] The award of interest is a discretion of the court. If at all an interest is to be awarded on the 10% deposit, it should start from the date when the action was first filed by the plaintiff at the High Court, claiming for the refund of the deposit. The Privy Council in *Menaka v. Lum Kum Chum* (*supra*) had the opportunity to deal with the same issue ie, on the issue of interest to be awarded on the refund of money paid under a void or illegal contract which had contravened the provision of s. 8 of the Moneylenders Ordinance 1951. Lord Fraser of Tullybelton, delivering the judgment of the board, aptly said:

> Their Lordships therefore do not consider that it would be right to award interest from a date before the institution of these proceedings. But after that date different considerations apply and the award of interest is a matter for the discretion of the court. It is true that apparently *Harnath Kaur*, (*supra*) was cited before Mohamed Azmi J, but the learned judge gave no reason for not awarding any interest and their Lordships therefore do not consider that he can be taken to have exercised his discretion on the point. The Federal Court made an award of interest at 6% from the date of raising the action (February 17, 1971) after reference to *Harnath Kaur*, (*supra*) and they clearly did exercise their discretion. Their Lordships see no reason to think that the Federal Court committed any error of law in their exercise and they will therefore not interfere with the decision of the Federal Court on this point. The result is that the Respondent is bound to pay to the Appellant the sum of $19,400 with interest at 6% from February 17, 1971.

[46] Applying the above principle, we are of the view that the interest to be awarded for the refunded deposit of RM1.6 million to the plaintiff should be at the rate of (8%) per annum calculated from the date when the writ was filed in the High Court by the plaintiff on 24 January 2002 until the date of full settlement.

[47] Learned counsel for the defendant in challenging the restitution order made by the Court of Appeal referred to the ruling of the Federal Court in *Rimba Muda Timber Trading v. Lim Kuoh Wee* [2006] 3 CLJ 93; [2006] 4 MLJ 505. In that case, the plaintiff filed an action against the defendant for trespass and conversion relating to timber concession area in Pahang. The High Court dismissed the claim, however on appeal the Court of Appeal allowed the claim for conversion and directed that damages be assessed by the SAR of the High Court. On appeal to the Federal Court, the defendant contended that the property in the logged timber could not in law pass to the plaintiff on the ground that the underlying contract with the licence holder was illegal being in breach of the provisions of the National Forestry Act 1984. The Defendant's appeal to the Federal Court was dismissed. In doing so, the Federal Court made *inter alia* the following rulings:

> (a) the fact that the contract was illegal would not prevent the property in the logged timber passing to the Respondent who had fully paid for the timber. In the circumstances, this court therefore agree with the Court of Appeal that even if the contract was illegal that did not prevent the property right in the logs from being vested in the Respondent. The claim by the Respondent could not be defeated purely on the ground that the relevant contract was illegal as the Respondent did not ground his claim on the illegal contract. The Respondent here merely relied on the contract as a basis for his claim to the property right in the logs; and
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> (b) in an action founded on the tort of conversion, property rights could pass under a contract even though the contract is tainted with illegality, provided that the action is not grounded on the illegal contract.

[48] Our view is that *Rimba Muda* can easily be distinguishable from the present case. In *Rimba Muda* the cause of action was based on tort of conversion where the contract in question was fully concluded and executed by the parties concerned. The plaintiff had fully paid for the timber; and the plaintiff had fully discharged his part of the bargain and there was nothing more for

him to do under the contract. On this context, the Federal Court affirmed that the contract "was fully executed once the plaintiff paid the full sum of RM140,000 to Chan and the property right in the logs immediately passed to the respondent (plaintiff) upon the issuance of the license to extract the timber to the licence holder."

[49] The Federal Court in that case also referred to the Privy Council's case of *Sajan Singh v. Sardara Ali* [1959] 1 LNS 90; [1960] MLJ 52 (PC) (which was also cited by learned counsel for the defendant in the present appeal in supporting that restitution or refund of deposit is barred in such circumstances). In that case, the Privy Council held, *inter alia*, that although the transaction between the plaintiff and the defendant was illegal being in contravention of certain regulations governing the transfer and use of motor vehicles, nevertheless it was fully executed and carried out and on that account it was effective to pass the property in the lorry to the plaintiff. Lord Denning in delivering decision of the board that restitution is barred, said:

> The reason is because the transferor, having fully achieved his unworthy end, cannot be allowed to turn round and repudiate the means by which he did it – he cannot throw over the transfer. And the transferee, having got the property, can assert his title to it against all the world, not because there is not one who can assert a better title to it. The court does not confiscate the property because of the illegality – it has no power to do so – so it says, in the words of Lord Eldon: "Let the estate lie where it falls.

[50] Both *Rimba Muda* and *Sajan Singh* dealt with situation where the contracts or agreements in dispute, though found to be illegal, were fully executed and fully carried out by the parties. The contract was fully concluded and completed; and the plaintiff "had fully discharged his part of the bargain and there was nothing more for him to do". The situation in the present case before us is different and distinguishable. Here, the SPA was not completed by the completion date; a mandatory pre condition statutory requirement under s. 132C of the Companies Act 1965 had not been obtained or fulfilled; the parties have not fully discharged their obligations under the SPA; and the subject matter of the sale ie, the transfer of the shares of CHSB from the defendant

(as vendor) to the plaintiff (as purchaser) had not been affected yet. There was no binding agreement to be enforced until the requirement was satisfied and fulfilled.

[51] The Court of Appeal, after finding that the mandatory statutory requirement under s. 132C of the Companies Act 1965 could not be waived by agreement of the parties had erroneously found that "bereft of that compliance, the SPA become voidable at the option of the plaintiff and the plaintiff was entitled to the refund of the deposit and to obtain damages." In the grounds of judgment of the Court of Appeal, it is stated:

> [54] Clause 12.11 of the SPA stipulates that time is of the essence. That being the case, we will activate section 56 of the Contracts Act 1950. This section states that when time is of the essence and the contractual obligation is not performed on the stipulated time frame, the contract is voidable at the option of the promisee.
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> [55] As alluded to earlier, the Defendant's contractual obligation under the SPA was to deliver vacant possession on the completion date because time was of the essence and an essential condition of the SPA. And the failure of the Defendant to deliver vacant possession of the land to the Plaintiff on the completion date, made the SPA voidable at the Plaintiff's option.

The SPA was void, not voidable at the option of the plaintiff.

[52] In allowing the appeal by the plaintiff, the Court of Appeal made a further order that the defendant to pay the plaintiff damages to be assessed by the Registrar of the High Court together with interest at the rate of eight (8%) percent per annum calculated from 10 February 1996 to the date of full settlement or *in lieu* of assessment, the sum of RM3.2 million as agreed liquidated damages, which was stipulated in cl. 11B of the SPA to be paid by the defendant to the plaintiff.

[53] The issue before us now is whether the Court of Appeal could make such an order for damages to be assessed in favour of the plaintiff or *in lieu* of that, to enforce cl. 11B of the void SPA for the defendant to pay the plaintiff an agreed RM3.2 million as liquidated damages.

[54] As stated earlier in this judgment, a void contract or agreement cannot be enforced by law. When a contract or agreement is void, the whole terms in the contract are void and cannot be enforced. No term of the said contract can be spared. By making the above order for damages, the Court of Appeal clearly was enforcing the void SPA. There is no legal basis for that order. It is perfectly settled, that where the contract which the plaintiff seeks to enforce, is expressly or by implication forbidden by the common law or statute (as in the present case) no court will lend its assistance to give effect, more so where both parties to the contract (as in the present case) were consciously and willingly agreed to the contravention of the law by not complying with the requirement of s. 132C. Both parties were equally at fault (*potior est conditio defendantis*). (see: *Hughes and others v. Asset Managers* [1995] 3 All ER 669; *Cape v. Rowland* [1836] 2 M&W 149l, 150 ER 707; and *Holman v. Johnson* [1775] 98 ER 1120).

[55] Section 66 of the Contracts Act 1950 is clear on this point, that when a contract becomes void (as in the present case) the party who has received any advantage under the contract or agreement is bound to restore it to the person to whom he received it. The advantage to be restored under the section refers to the advantage that he had actually received from the other person. If the advantage received was in the form of 10% deposit of RM1.6 million, that same advantage must be restored or refunded to the plaintiff. If that cannot be done for whatever reason, then the defendant is bound to make compensation for it - either one, not both. In this regard illustration (d) to s. 66 is instructive:

> (d) A contracts to sing for B at a concert for RM1,000, which are paid in advance. A is too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if a had been able to sing, but must refund to B the RM1,000 paid in advance.

[56] The above illustration reflects the clear principle of contract law that consequential damages can only be claimed when there is in existence a valid and enforceable contract between the parties; and one of the parties have breached any one of the fundamental terms of the contract, as a result of which the claimant suffers loss or damage. In a case where the contract is void there is no enforceable term and therefore the question of breach of the contract to support claim for consequential damages does not arise.

[57] The question relating to "vacant possession" as stipulated in the SPA was also raised in the appeal before us. However, learned counsel for the defendant submitted that it was unnecessary to deal with this question if the Court of Appeal was wrong on the issue concerning contravention of s. 132C particularly where the plaintiff was not an innocent third party within the meaning of s. 132C(3) of the Companies Act 1965. No submission was canvassed before us by the defendant's solicitors on this ground. In effect, learned counsel for the defendant only relied on the question concerning non-compliance of s. 132C of the Companies Act 1965, in support its appeal before us.

[58] We are in agreement with the learned counsel for the defendant on this point. As we have stated earlier, non-compliance or contravention of the mandatory statutory requirement under s. 132C of the Companies Act 1965 rendered the SPA to be void and not enforceable by law. Therefore the question on "vacant possession" is no longer relevant. To deal with it would means we are dealing with the terms of a void agreement or contract which ultimately cannot be enforced by law.

Conclusion

[59] Based on the above considerations, we would answer the questions posed to us in the following manner:

(a) the mandatory statutory provisions under s. 132C of the Companies Act 1965 must be complied with and cannot be waived by agreement of the parties;

(b) non-compliance or contravention of the requirement renders the contract as void and invalid; and thus cannot be enforceable by law;

(c) being a void contract, by virtue of s. 66 of the Contracts Act 1950, the court of law may order restoration of whatever consideration or advantage paid or given under that contract; and

(d) being a void contract, a court of law cannot order damages for breach of any terms of the contract in favour of one of the contracting parties.

[60] In the upshot, we allow the appeal in part, in that the order of the Court of Appeal relating to the issue of damages to be assessed together with its interest or *in lieu* of assessment, the sum of RM3.2 million as agreed liquidated damages (which was stipulated in cl. 11B of the SPA) to be paid by the defendant to the plaintiff, is set aside. We however dismiss the appeal against the order of the Court of Appeal relating to the refund of the 10% deposit of RM1.6 million to the plaintiff. That order is therefore upheld with a variation that the interest of eight (8%) percent per annum payable on the refund is to be calculated from 22 January 2002 (being the date of filing of the writ) to the date of full settlement. We now invite the parties to address us on costs.